CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY, PETITIONER,

vs.

CHRIS PEDERSEN, INDIVIDUALLY AND AS AGENT AND REPRESENTATIVE FOR AND IN BEHALF OF HIMSELF, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1944.

CERTIORARI GRANTED DECEMBER 18, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

J. F. FITZGERALD CONSTRUCTION COMPANY, PETITIONER,

vs.

CHRIS PEDERSEN, INDIVIDUALLY AND AS AGENT AND REPRESENTATIVE FOR AND IN BEHALF OF HIMSELF AND ALL OTHER EMPLOYEES OF THE DEFENDANT SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX.

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notice of appeal to Appellate Division	4	2
Former record on appeal	6	3
Notice of appeal from original judgment to Appellate Division	6	3
Summons	7	3
Complaint	8	4
Schedule "A"—List of employees of defendants involved in case at bar	13	7
Answer	14	8
Agreed statement of facts	16	9
Note re Schedule "A" to agreed statement of facts	19	11
Schedule "B"—List of employees with overtime hours and wages claimed	19	11
Opinion, Bergan, J.	21	12
Decision	25	15
Findings of fact	25	15
Conclusions of law	28	17

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—3674

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Former record on appeal—Continued		
Judgment	29	18
Order of affirmance of Appellate Division	30	18
Judgment of affirmance	32	19
Decision of affirmance of Appellate Division	34	20
Opinion for affirmance of Appellate Division, Schenck, J.	35	20
Dissenting opinion of Appellate Division, Bliss, J.	38	22
Notice of appeal to Court of Appeals	44	26
Order on remittitur of Court of Appeals	45	27
Judgment on remittitur	46	28
Mandate of Supreme Court of the United States	47	29
Oredr on mandate of Supreme Court of the United States	50	31
Judgment on mandate of Supreme Court of the United States	52	32
Defendant's notice of motion to dismiss complaint	55	34
Order denying defendant's motion to dismiss complaint	56	35
Plaintiff's notice of motion for summary judgment	57	35
Plaintiff's moving affidavit	58	36
Order granting summary judgment	65	41
Judgment	67	42
Opinion of Special Term, Foster, J.	68	42
Stipulation waiving certification	75	47
Notice of appeal to Court of Appeals	77	48
Order of Appellate Division	79	48
Judgment on order of Appellate Division	82	49
Decision of Appellate Division	84	51
Dissenting opinion, Schenck, J.	85	51
Stipulation waiving certification	95	58
Remittitur of Court of Appeals	97	59
Order on remittitur	100	60
Judgment on remittitur	102	62
Opinion of Court of Appeals, Loughran, J.	104	63
Dissenting opinion, Lehman, C. J.	106	65
Clerk's certificate (omitted in printing)	107	
Order allowing certiorari	108	66

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

CHRIS PEDERSEN, individually and as agent and representative for and in behalf of himself and all other employees of the defendant similarly situated, Respondent,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, Appellant

STATEMENT UNDER RULE 234

June 15, 1939—Action commenced.

Aug. 10, 1939—Issue joined by service of answer.

Dec. 29, 1939—Trial before Mr. Justice Bergan on stipulated facts.

Mar. 18, 1940—Judgment entered dismissing complaint (173 Misc. 188).

Mar. 23, 1940—Appeal by plaintiff to Appellate Division.

Nov. 12, 1941—Judgment affirmed by Appellate Division (262 App. Div. 665).

[fol. 2] Nov. 15, 1941—Order and judgment of affirmance entered in Columbia County Clerk's office.

Dec. 11, 1941—Appeal by plaintiff to Court of Appeals.

June 18, 1942—Court of Appeals unanimously affirmed judgment of Appellate Division (288 N. Y. 687).

June 20, 1942—Order and judgment on remittitur of Court of Appeals entered in Columbia County Clerk's office.

Sept. 14, 1942—Plaintiff filed petition for writ of certiorari in United States Supreme Court.

Feb. 8, 1943—Petition for writ of certiorari granted and judgment reversed.

Mar. 3, 1943—Defendant filed petition for rehearing in United States Supreme Court.

Mar. 8, 1943—Judgment amended by United States Supreme Court.

Mar. 18, 1943—Mandate of United States Supreme Court issued.

Apr. 20, 1943—Order and judgment on mandate entered in Columbia County Clerk's office.

May 3, 1943—Defendant served notice of motion for judgment dismissing complaint.

May 4, 1943—Plaintiff served notice of motion for summary judgment.

May 21, 1943—Motions returnable before Mr. Justice Foster at Special Term.

June 8, 1943—Decision of Special Term on motions.

[fol. 3] June 16, 1943—Order and judgment entered granting plaintiff's motion for summary judgment.

June 18, 1943—Order entered denying defendant's motion for judgment dismissing complaint.

There has been no change in parties or attorneys, except Wilson & Connor, Esqs., were substituted as attorneys for plaintiff on April 27, 1941, and by an order made September 8, 1939, one individual was dropped as a co-plaintiff and thirteen others were added as co-plaintiffs.

[fol. 4] In Supreme Court of New York, Columbia County

[Title omitted]

Notice of Appeal to Appellate Division

Sirs:

Please Take Notice, that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the order herein entered in Columbia County Clerk's office on June 16, 1943, granting plaintiff's motion for summary judgment, striking out the answer of the defendant and directing judgment in favor of plaintiff against defendant with interest, costs and attorney's fees, and defendant also appeals to said Appellate Division from the judgment herein entered in the same Clerk's office on June 16, 1943, whereby plaintiff recovered judgment against the defendant in the sum of Twelve Thousand Five Hundred Sixty-eight Dollars and Thirty-five Cents ($12,568.35) and defendant appeals from each and every part of said order and judgment upon both the law and the facts, and

[fol. 5] Please Take Further Notice, that the said defendant hereby appeals to said Appellate Division from the order herein entered in Columbia County Clerk's office on June 18, 1943, denying defendant's motion for a dismissal of the complaint.

Dated: June 21, 1943.

Yours, etc., Whalen, McNamee, Creble & Nichols, Attorneys for Defendant, Office and Post Office Address, 75 State Street, Albany, New York.

To Wilson & Connor, Attorneys for Plaintiff. Columbia County Clerk.

[fol. 6] **Former Record on Appeal**

IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

CHRIS PEDERSEN, individually and as agent and representative for and in behalf of himself and all other employees of the defendant similarly situated, Plaintiff,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, Defendant

NOTICE OF APPEAL FROM ORIGINAL JUDGMENT TO APPELLATE DIVISION

SIRS:

Please Take Notice that plaintiff Chris Pedersen, individually and as Agent and Representative, etc., appeals to the Appellate Division of the Supreme Court, 3rd Department, from a final judgment dated March 18, 1940, and entered in the Columbia County Clerk's office March 18, 1940 dismissing plaintiff's complaint herein on the merits with costs and from each and every part of the said judgment from the whole thereof.

Dated, Albany, N. Y., March 23, 1940.

Ransom H. Gillett, Office & P. O. Address, 19 D. & H. Building, Albany, N. Y.

To Grant A. Miller, Columbia County Clerk, Hudson, N. Y. Whalen, Creble, McNamee & Nichols, Attorneys for Defendant, 75 State Street, Albany, N. Y.

[fol. 7] IN SUPREME COURT OF NEW YORK, COUNTY OF COLUMBIA

[Title omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice

of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Columbia.

Dated, June 14, 1939.

Ransom H. Gillett, Attorney for Plaintiff, Office and Post Office Address, 19, D. & H. Building, Albany, New York.

[fol. 8] In Supreme Court of New York, Columbia County

Complaint

Plaintiff complains against defendant and alleges:

1. Plaintiff is a resident of the Village of Kinderhook, Columbia County, New York, and has been duly designated, pursuant to Section 16, Ch. 676 of the Act of Congress of June 25, 1938, known as the Fair Labor Standards Act of 1938 (29. U. S. C. A.; Sec. 216), as agent and representative of certain employees of Defendant, employed by Defendant in interstate commerce, to maintain this action on their behalf and on behalf of all employees similarly situated pursuant to the provisions of said Act for overtime compensation and for liquidated damages due and payable to them and each of them, as in said Act provided.

2. Annexed hereto and made part hereof is Schedule "A" showing the names and places of residence of those employees of the Defendant who are similarly situated as Plaintiff and who have designated Plaintiff as their agent and representative to maintain this action for and on their behalf as is in said Act provided; and showing the number of hours of overtime each of the employees named in Schedule "A" claims to have worked for Defendant in interstate commerce (as more fully and at large hereinafter appears), the hourly rate of pay of each said employees, and the total amount claimed by each of them for overtime compensation and for liquidated damages.

3. At all times hereinafter mentioned, defendant was a foreign corporation duly licensed to do business in this state

[fol. 9] and was engaged as a contractor in the repair of certain bridges erected, maintained and used by the Boston & Albany Railroad in interstate commerce in Columbia County, and plaintiff, together with the employees whom he here represents were employed in interstate commerce by defendant in and about the repair, maintenance and use of said bridges, which were and are used as a means of transportation and communication from New York State to places outside thereof.

4. Such employment was within the terms and provisions of an Act of Congress entitled "Fair Labor Standards Act of 1938," and was not within any of the exceptions in said Act set forth.

5. Plaintiff, his co-plaintiffs and other of defendant's employees similarly situated were so engaged in interstate commerce in work on the said bridges as employees of the defendant from time to time since October 24, 1938.

6. Since October 22, 1938, when the said Fair Labor Standards Act of 1938 became effective, defendant has required and compelled plaintiff and his co-plaintiffs and its other employees similarly situated to work ten hours a day seven day a week with the exception of Thanksgiving Day and Christmas, 1938, and Easter Sunday, 1939, without paying them the overtime to which they were and are entitled pursuant to the provisions of the Act of Congress cited above.

7. Since October 22, 1938, plaintiff, his co-plaintiffs and other of defendant's employees similarly situated whom he [fol. 10] here represents have worked ten hours per day in interstate commerce as aforesaid some for the entire number of elapsed days since the said Act took effect, others for a lesser number of days, depending upon the date of their employment, or their inability to work whilst so employed due to temporary lay-offs, illness or other circumstances or other factors or conditions affecting their individual cases; as more fully and at large appears in Schedule "A" annexed hereto and made part hereof.

8. Since October 22, 1938, plaintiff and his co-plaintiffs and his fellow employees similarly situated whom he here represents have been paid by the hour at different rates of

pay per hour ranging between .45 cents and .85 cents per hour; all as set forth in Schedule "A."

9. Between October 24, 1938, and up to on or about April 1, 1939, plaintiff was paid at the rate of .45 cents per hour. From on or about April 1, 1939, to May 31, 1939, plaintiff was paid at the rate of .60 cents per hour.

10. During the entire period, October 24, 1938, to May 31, 1939, plaintiff worked ten hours a day seven days a week excepting Thanksgiving and Christmas days in 1938 and Easter Sunday, 1939, and three half days preceding those holidays and four days when he was unable to work by reason of sickness.

11. During the period, October 24, 1938, and April 1, 1939, plaintiff worked 154 days for ten hours a day and during the period, April 1, 1939, to May 31, 1939, plaintiff worked 58 days for ten hours a day.

[fol. 11] 12. By reason of these premises and by virtue of the provisions of the Act of Congress above referred to, plaintiff is entitled to recover from defendant overtime pay and compensation earned during the period, October 24, 1938, to April 1, 1939, in amount Ninety-two Dollars and Forty Cents ($92.40); and for the period, April 1, 1939, to May 31, 1939, Forty-six Dollars and Forty Cents ($46.40); in all, the sum of One Hundred Thirty-eight Dollars and Eighty Cents ($138.80), to which plaintiff is entitled as overtime, plus a like sum as liquidated damages, or a total amount of Two Hundred Seventy-seven Dollars and Sixty Cents ($277.60).

13. By reason of the same premises, as applied to each of the employees mentioned in Schedule "A," defendant is indebted to plaintiff's co-plaintiffs and the employees he represents as shown on Schedule "A" annexed and to all its others employees similarly situated in a sum of money equivalent to one-half times their respective hourly rate of pay for the hours each worked in excess of the forty-four hour week prescribed by the Act of Congress above referred to and a like sum as liquidated damages, which sum amounts to Six Thousand Two Hundred Forty-six Dollars and Thirty Cents ($6,246.30), as shown on Schedule "A" hereto annexed.

Wherefore, plaintiff demands judgment against defendant on his own behalf in the sum of Four Hundred Sixty-two Dollars and Forty Cents ($462.40), together with a reasonable attorney's fee, and on behalf of his co-plaintiffs and all other employees of the defendant similarly situated, [fol. 12] such sum as shall be determined to be due each of them on due proof to be presented in this action on their behalf as to the amount of overtime due each of them respectively as shown by Schedule "A" hereto annexed; in all, the sum of Six Thousand Seven Hundred Eight Dollars and Seventy Cents ($6,708.70), plus costs of this action.

Dated: Albany, New York, June 14, 1939.

Ransom H. Gillett, Plaintiff's Attorney, Office & P. O. Address, 19 D. & H Building, Albany, N. Y.

(Duly verified by plaintiff June 15, 1939.)

[fol. 13] SCHEDULE "A" TO COMPLAINT

	Name	Address	Overtime Hours	Rate per Hour Cts.	Due for Overtime	Overtime plus Liquidated Damages
1.	Harry Blake	East Chatham	458-2/3	.50	$114.67	$229.34
2.	James Blake	East Chatham	520	.45	117.00	234.00
3.	Joseph Condon	Chatham	424	.85	180.20	360.40
4.	Hugh Darby	Chatham Center	368	.45	82.80	165.60
5.	Owen Francis	Chatham	122-2/3	.45	27.60	55.20
6.	John H. Grimes	Chatham Center	528	.45	118.80	237.60
7.	William Gray	Chatham	488	.45	109.80	219.60
8.	Bishop Hooser	Chatham Center	474-2/3	.55	130.53	261.06
9.	Fred Houston	Niverville	306-2/3	.45	69.00	138.00
10.	Francis Harris	Chatham Center	578-2/3	.45	130.20	260.40
11.	Peter Kirsebam	Stuyvesant Falls	578-2/3	.85	245.93	491.86
12.	Sanford Kittle	Chatham	498-2/3	.45	112.20	224.40
13.	Irving C. Kittle	Chatham Center	285-1/3	.45	64.20	128.40
14.	Soren Lauridsen	Kinderhook	523-2/3	.45	117.60	235.20
15.	Charles Minneci	Old Chatham	106-2/3	.45	24.00	48.00
16-a.	Robert Nichols	Chatham	42-2/3	.45	9.60	19.20
16-b.	" "	"	304	.60	91.20	182.40
16-c.	" "	"	192	.70	67.20	134.40
17.	Merton Oles	Chatham	101-2/3	.45	22.80	45.60
18.	Webster Pulver	Chatham Center	528	.45	118.80	237.60
19.	Harry Peterson	Chatham	133-1/3	.45	30.00	60.00
20.	Donald Paterson	Chatham	578-2/3	.85	245.93	491.86
21.	Gerald Shay	Chatham Center	578-2/3	.45	130.20	260.40
22.	Wilford Sheldon	Chatham	437-1/3	.45	98.40	196.80
23.	Robert Sheldon	Chatham	538-2/3	.45	121.20	242.40
24-a.	Theodore Stalker	Chatham	68-2/3	.45	15.45	30.90
24-b.	" "	"	226-2/3	.50	56.67	113.34
24-c.	" "	"	152	.60	45.60	91.20
25.	Alfred Smith	Chatham	472	.45	106.20	212.40
26.	Andrew Van Alstyne	Chatham Center	410-2/3	.45	92.40	184.80
27-a.	Harry Voss	Kinderhook	300	.75	112.50	225.00
27-b.	" "	"	152	.85	64.60	129.20
28.	Angelo Yocco	Chatham	117-1/3	.85	49.87	99.74
					3,123.15	6,246.30

[fol. 14] In Supreme Court of New York, Columbia County

Answer

Defendant, answering the complaint herein:

First. Denies that it has knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in the paragraphs of the complaint designated "1" and "2."

Second. Denies, upon information and belief, the allegations, and each of them, contained in the paragraph of the complaint designated "3," except defendants admits that at all times in the complaint mentioned, it was and now is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and duly licensed to do business in the State of New York.

Third. Denies, upon information and belief, the allegations, and each of them, contained in the paragraphs of the complaint designated respectively "4," "5," "6," "7," "10," "11," "12" and "13."

Fourth. Denies, upon information and belief, the allegations, and each of them, contained in the paragraph of the complaint designated "8," except defendant admits that at various times since October 22, 1938, plaintiff and the persons mentioned in Schedule "A" annexed to the complaint have been paid by the hour at different rates of pay per hour ranging between forty-five cents and eighty-five cents per hour.

Fifth. Denies, upon information and belief, the allegations, and each of them, contained in the paragraph of the [fol. 15] complaint designated "9," except defendant admits that between October 24, 1938, and up to on or about April 1, 1939, plaintiff was paid at the rate of forty-five cents per hour.

Wherefore, defendant demands judgment dismissing the complaint herein with costs.

Whalen, McNamee, Creble & Nichols; Attorneys for Defendant, Office and Post Office Address, 75 State Street, Albany, New York.

(Duly verified by defendant August 10, 1939.)

[fol. 16] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

Agreed Statement of Facts

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the above action be submitted to the Court for determination at a term thereof, commencing on November 13, 1939, at the County Court House in the City of Hudson, N. Y., upon the summons, complaint, answer and order herein granted at a Special Term of this Court held at Albany, N. Y., on September 8, 1939, and entered in Columbia County Clerk's Office September 19, 1939, and the following agreed statement of facts in lieu of proof, subject, however, to the right of either party to review such determination and any judgment which may be entered thereon by appeal or other proper remedy in any Appellate Court:

STATEMENT OF FACTS

1. The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right of way in the Town of Chatham, Columbia County, New York.

2. In September, 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood.

3. Thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction [fol. 17] of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

4. The construction of the new abutments by the defendant constituted about two-thirds of the total work performed by the defendant under said contract, and the repairs to the substructures of the other two bridges constituted the remainder of said work.

5. Some of the material used by the defendant in performing its work under said contract came from without the State of New York before being used by the defendant in the work performed by it under said contract.

6. Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule "A" annexed hereto.

7. The tracks of the railroad were carried on the superstructures of all of said bridges while the said new abutments were being built at two of said bridges, and while said repairs were being made to the substructures of the other two bridges, but said new abutments were not used to support the superstructures of said two bridges nor the railroad roadbed, nor by the railroad company in any way at any time while defendant was engaged in the performance of the work under said contract.

8. After all of the work performed by defendant under said contract had been completed, the railroad company in- [fol. 18] spected and accepted the same, and thereafter, the railroad lowered the superstructures of the two bridges upon said new abutments and all of said bridges have been used by the railroad ever since over which it has operated trains between the States of New York and Massachusetts.

9. The federal statute, known as the Fair Labor Standards Act of 1938, was adopted by Congress and approved by the President four months prior to October 24, 1938.

10. After October 24, 1938, until the completion of said work by the defendant under said contract, each plaintiff worked for defendant the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule "A" annexed hereto.

11. The total number of hours worked by each plaintiff in excess of forty-four (44) hours per week is shown on Schedule "B" annexed hereto, together with the amount of money claimed by each plaintiff to be due him, 50% of which represents wages at one-half the hourly rate for the total number of hours worked by each plaintiff in excess of 44 hours per week, and the remaining 50% of which represents an equivalent amount claimed by each plaintiff

as liquidated damages pursuant to the provisions of said statute.

Dated: December 1, 1939.

Ransom H. Gillett, Plaintiff's Attorney. Whalen, McNamee, Creble & Nichols, Defendant's Attorneys.

[fol. 19] NOTE RE SCHEDULE "A" TO AGREED STATEMENT OF FACTS

Pursuant to Rule 232 R. C. P. Schedule A referred to in the Agreed Statement of Fact is not printed at length for the reason that the matters therein set forth are not deemed necessary to the proper determination of this appeal.

SCHEDULE "B" TO AGREED STATEMENT OF FACTS

Overtime hours and wages claimed by the following plaintiffs as shown by time sheets furnished by defendant, dated October 19, 1939.

Name	Overtime Hours	Amount Claimed for Overtime & Damages
1. Chris Pedersen	533	$261.78
2. Harry Blake	429.5	213.56
3. Joseph Condon	550.5	455.20
4. James Blake	534	240.30
5. Hugh Darby	416	187.20
6. Owen Francis	146	65.70
7. John H. Grimes	336	151.20
8. William Gray	233.5	105.06
9. Bishop Hooser	653	349.50
10. Fred Huston	284.5	128.02
11. Francis Harris	113.5	51.07
12. Peter Kirsebaum	728	586.90
13. Sanford Kittle	260	117.00
14. Irving C. Kittle	142.5	64.12
15. Soren Lauridsen	604	271.80
16. Charles Minneci	150.5	67.72

[fol. 20]

Name	Overtime Hours	Amount Claimed for Overtime & Damges
18. Merton Oles	121	54.46
19. Webster Pulver	394.5	177.53
20. Harry Peterson	111.5	50.18
21. Donald Paterson	680.5	578.42
22. Gerald Shay	435	200.34
23. Wilford Sheldon	225.5	101.48
24. Robert Sheldon	702	315.90
25. Theodore Stalker	586	294.76
26. Alfred Smith	431.5	198.82
27. Andrew VanAlstyne, Sr.	473	212.86
28. Harry Voss	255	214.68
29. John F. Sheldon	233	104.86
30. Joseph LaPlaca	115.5	51.98
31. Edward LaPlaca	53	23.86
32. Harry Middlebrook	251	112.96
33. Knute Odegaard	126	73.60
34. William M. Herrick	189	85.06
35. Frank C. Hatch	59.5	26.78
36. Calvin Thompson	146.5	65.92
37. Charles H. Barton	162.5	121.88
38. Frederick Beaman	246	110.70
39. Carmon S. Navarro	365	310.26
40. Charles F. McGill	54	24.30
		$7,186.72

[fol. 21] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

OPINION

BERGAN, J.:

The first problem presented is whether plaintiff, in the stipulated facts under which he was employed by defendant, was "engaged in the production of goods for commerce" within the scope of Fair Labor Standards Act of 1938, Section 7 (a). The definition of the word "goods" is quite inclusive (Sec. 3 [i]). It is conditioned, in the sense used in Section 7 (a), however, by the word "commerce," and in

turn, by the statutory definition of that word in Section 3 (b). That definition is that commerce is "trade, commerce, transportation, transmission or communication among the several states * * *." This statutory definition is in general harmony with the commonly accepted sense of the word in current usage.

The construction of new abutments under two bridges, and the repair of the substructures under two other bridges, was not, I think, the "production of goods for commerce." Broadly as the statutory definition may be viewed, the abutments and the substructures of the four bridges cannot be treated as goods, wares, products, commodities or merchandise and certainly were not "articles or subjects of commerce." They were never themselves to be the subjects of trade or commerce or transportation, or transmission or communication among the several states. The plain intent of the statute and the common and usual sense in which the words employed and their definition in the statute are to be construed excludes from the phrase "production of [fol. 22] goods for commerce" the construction of the permanent, stationary abutments and substructures of bridges here stipulated.

The terms used are not, indeed, static concepts; they have been made elastic to meet legislative views of the necessities of changing national conditions. But I have seen no authoritative extension of definition beyond common understanding and usage in the scope here urged by the plaintiff, and I conclude that plaintiff, under the facts stipulated, was not engaged in the production of goods for commerce.

The question remaining for determination is whether plaintiff was, within Section 7 (a), "engaged in commerce," which means, of course, "among the several states." This question is more debatable than the first one considered, but the answer, too, must be given in the negative.

The railroad company for which defendant was retained is engaged in interstate commerce.

The bridges for which the abutments and substructures were built were subsequently to be used by the railroad in such commerce. The stipulation concedes that the new abutments, while being built by defendant, did not carry the tracks of the railroad, but that the bridges under which the substructures were being repaired did carry the tracks of the railroad during such operation.

Since there is no attempt in the stipulated facts to segregate the overtime hours attributed to the abutment operations from those attributed to the substructure operations, and since about two-thirds of the total work was comprised of building the abutments, the overtime work [fol. 23] may be more readily attributed to the abutments than to the substructures. Indeed, for all that appears, all of it may be attributed to the former, but in any event the result reached will be the same.

The nature of this work performed by the defendant, not itself engaged in interstate commerce, cannot be treated as such commerce. The business which it performed upon these bridges was local in character and was wholly separated from interstate commerce (Browning v. Waycross, 233 U. S. 16, 22). The defendant, and hence the plaintiff, too, seem to be engaged in the kind of undertaking for a railroad in which the signal company was engaged in General Railway Signal Co. v. Virginia *ex rel.* Corporation Commission (246 U. S. 500). It is no answer to say that this was a tax case. The principle was stated, and it is the same, however the controversy arose. "We think," Mr. Justice McReynolds said (p. 510), "the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine of Browning v. Waycross."

Whatever might be said of the situation that would result if the plaintiff were employed by the railroad company itself in repairing the substructures of the bridges it was actually using in interstate commerce, it would seem that the construction of the abutments, prior to their actual and physical use in interstate commerce, even by the railroad itself, would not result in the engagement of plaintiff in interstate commerce. So it was held in respect of a tunnel, partially bored "and hence not in use as an instrumentality of interstate commerce" (Raymond v. Chicago, Mil- [fol. 24] waukee & St. Paul Rwy., 243 U. S. 43, 44).

Where the railroad engaged in interstate commerce itself repaired a bridge being used as an instrumentality of such commerce, an employee engaged in such an operation is engaged in interstate commerce (Pedersen v. Delaware, Lackawanna & Western R. R., 229 U. S. 146). But this was upon the theory as the court pointed out (p. 151) that the work was not being done independently of the interstate commerce in which the railroad was engaged, but was so

closely connected with it as to be a part of it. No such theory applies to the work of this defendant which was not engaged in interstate commerce at all.

Judgment for defendant dismissing the complaint upon the merits.

Submit decision and judgment on or before February 2, 1940.

[fol. 25] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

Decision—March 2, 1940

Present: Honorable Francis Bergan, Justice.

The above-entitled action having regularly come on to be tried before the Court without a jury at this term of Court and having been duly submitted to the Court on December 29, 1939, pursuant to Stipulation of the attorneys for the respective parties, dated December 1, 1939, and upon the pleadings and allegations of the respective parties and the agreed statement of facts as contained in said stipulation of December 1, 1939, in lieu of proof, and after hearing Ransom H. Gillett, Esq., attorney for the plaintiff, and Whalen, McNamee, Creble & Nichols, attorneys for the defendant; I find and decide as follows:

FINDINGS OF FACT

1. That The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right-of-way in the Town of Chatham, Columbia County, New York.

2. That in September, 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood.

3. That thereafter, the railroad company entered into a contract with the defendant, an independent contractor en- [fol. 26] gaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as

aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

4. That the construction of the new abutments by the defendant constituted about two-thirds of the total work performed by the defendant under said contract, and the repairs to the substructures of the other two bridges constituted the remainder of said work.

5. That some of the material used by the defendant in performing its work under said contract came from without the State of New York before being used by the defendant in the work performed by it under said contract.

6. That defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule "A" annexed to said stipulation of December 1, 1939.

7. That the tracks of the railroad were carried on the superstructures of all of said bridges while the said new abutments were being built at two of said bridges, and while said repairs were being made to the substructures of the other two bridges, but said new abutments were not used to support the superstructures of said two bridges nor the railroad roadbed, nor by the railroad company in any way at any time while defendant was engaged in the performance of the work under said contract.

[fol. 27] 8. That after all of the work performed by defendant under said contract had been completed, the railroad company inspected and accepted the same, and thereafter, the railroad lowered the superstructures of the two bridges upon said new abutments and all of said bridges have been used by the railroad ever since over which it has operated trains between the States of New York and Massachusetts.

9. That the Federal statute, known as the Fair Labor Standards Act of 1938, was adopted by Congress and approved by the President four months prior to October 24, 1938.

10. That after October 24, 1938, until the completion of said work by the defendant under said contract, each plaintiff worked for defendant the number of hours per week and was paid by the defendant at the hourly rate of pay as

shown on Schedule "A" annexed to said stipulation of December 1, 1939.

11. That the total number of hours worked by each plaintiff in excess of forty-four (44) hours per week is shown on Schedule "B" annexed to said stipulation of December 1, 1939, together with the amount of money claimed at one-half the hourly rate for the total number of hours worked by each plaintiff in excess of 44 hours per week, and the remaining 50% of which represents an equivalent amount claimed by each plaintiff as liquidated damages, pursuant to the provisions of said statute.

[fol. 28] CONCLUSIONS OF LAW

First. That the term "commerce" as used in said Federal Fair Labor Standards Act of 1938, hereinafter referred to as the "Act" means and applies only to trade, commerce, transportation, transmission or communication among the several states, or from any state to any place outside thereof.

Second. That neither plaintiff nor any of the employees of the defendant referred to in the findings of fact herein as the plaintiffs in performing work referred to in the findings of fact herein, was engaged in the production of goods for commerce within the scope, meaning or application of said Act.

Third. That neither plaintiff nor any of said employees of the defendant in performing work referred to in the findings of fact herein, was engaged in commerce within the scope, meaning or application of said Act.

Fourth. That neither plaintiff nor any of said employees of the defendant is entitled to any of the relief which he seeks herein.

Fifth. That the complaint herein should be, and it hereby is, dismissed upon the merits, with costs to the defendant, and that judgment be entered accordingly.

Dated: March 2, 1940.

Francis Bergan, Justice Supreme Court.

[fol. 29] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

JUDGMENT—March 18, 1940

The above-entitled action having been duly submitted to the Court for determination without a jury at a Term thereof commencing on November 13, 1939, and the Court having made findings of fact and conclusions of law, as contained in its decision in writing which has this day been filed in the office of the Clerk of Columbia County, by which decision the Court has directed that judgment be entered dismissing the complaint upon the merits with costs to the defendant,

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged, that the complaint herein be, and it hereby is, dismissed upon the merits, and that the defendant recover of the plaintiff its costs as taxed in the sum of Two Hundred Eighteen and 50/100 Dollars ($218.50) and that execution issued accordingly.

Dated: March 18th, 1940.

Grant A. Miller, Clerk, by Harold I Hall, Deputy.

[fol. 30] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

CHRIS PEDERSEN, Individually and as Agent and Representative for and in Behalf of Himself and All Other Employees of the Defendant Similarly Situated, Appellant,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, Respondent

ORDER OF AFFIRMANCE—November 14, 1941

The appeal taken by the above appellant from a judgment herein entered in Columbia County Clerk's office on March 18, 1940, having been argued at this term of Court on behalf of the appellant by William E. J. Connor, Esq., of [fol. 31] counsel for the appellant, and by Henry E. Foley,

Esq., of counsel for Whalen, McNamee, Creble & Nichols, attorneys for the respondent, and after due deliberation this Court having handed down its decision herein on November 12, 1941,

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the respondent, it is, with Presiding Justice Hill and Justice Bliss dissenting.

Ordered that said judgment so appealed from be, and the same hereby is, affirmed with costs to the respondent.

John S. Herrick, Clerk.

A true copy. John S. Herrick, Clerk.

Entered in Columbia County Clerk's office November 15, 1941.

[fol. 32] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

[Title omitted]

JUDGMENT OF AFFIRMANCE—November 15, 1941

The above named plaintiff having appealed to the Appellate Division of the Supreme Court, Third Department, from the judgment in the above entitled action duly entered in the office of the Clerk of the County of Columbia on March 18, 1940, and said Appellate Division, by its order entered in the office of the Clerk thereof on November 14, 1941, a certified copy of which, together with the original record on appeal, has been this day filed in the office of said County Clerk, having affirmed with costs to the defendant against the plaintiff said judgment so appealed from, and said defendant's costs having been duly taxed at the sum hereinafter stated,

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged that said judgment entered in the office of the Clerk of the County of Columbia on March 18, 1940, be, and the same hereby is, affirmed and that the defendant recover of the plaintiff the sum of $102.55, its costs, and that execution issue accordingly.

Dated: November 15, 1941.

Grant A. Miller, Clerk, by Harold I. Hall, Deputy.

Entered in Columbia County Clerk's office November 15, 1941.

[fol. 34] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

DECISION—November 12, 1941

Judgment dismissing the complaint affirmed with costs. Opinion by Schenck, J.

Crapser and Foster, JJ., concur.

Bliss, J., dissents and votes to reverse, with an opinion in which Hill, P. J., concurs.

[fol. 35] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION FOR AFFIRMANCE

SCHENCK, J.:

Two questions are here presented: (a) Were the several persons represented by plaintiff engaged in interstate commerce; (b) Were these several persons, hereinafter referred to as plaintiffs, engaged in the production of goods for commerce.

The appeal here is taken from a judgment dismissing the complaint upon the merits in an action brought by plaintiff Pedersen, individually, and as representative of certain other former employees of defendant to recover overtime wages and an equivalent amount as liquidated damages pursuant to the provisions of Sections 7 and 16 of the Federal Fair Labor Standards Act of 1938. The action was submitted to the Court below upon an agreed statement of facts. As lessee of the Boston and Albany Railroad, the New York Central Railroad Company operated trains between New York and Massachusetts over four bridges located on the railroad right of way in the Town of Chatham. In September, 1938, the abutments of two of said bridges were completely destroyed by flood, and the superstructures of the other two bridges were damaged. The defendant is an independent contractor engaged in general construction work. He entered into a contract with the railroad company for the construction of new abutments

under the two bridges destroyed and for the repairing of the superstructures of the two damaged bridges. Plaintiffs were employed by defendant on this work. During the [fol. 36] erection of the new abutments and the completion of the repairs to the superstructures of the other bridges, the tracks of the railroad were carried on the superstructures of all of the four bridges, but the said new abutments were not used to support such superstructures nor the railroad bed, nor were said abutments used by the railroad company in any way during the course of the work being performed by defendant under his said contract.

While the railroad company was obviously engaged in interstate commerce the defendant was an independent contractor employed by the railroad to perform work clearly local in its character and separate and distinct from such commerce. (*Browning v. Waycross*, 233 U. S. 16, 22.) Plaintiffs were at no time employed by the railroad company. We have no such situation as found in *Pedersen v. Delaware, Lackawanna & Western R. R.*, 229 U. S. 146, for there the work was being prosecuted by a railroad engaged in interstate commerce and the work was so clearly connected with it as to be a part thereof. Here, the defendant was not engaged in interstate commerce and was simply performing local construction work which was neither an interstate occupation nor commerce. (*General Railroad Signal Co. Virginia ex rel. Corporation Commission*, 246 U. S. 500.) Interstate commerce means interstate commercial intercourse, and while defendant, pursuant to its contract, was engaged in work upon an instrumentality of interstate commerce, the performance of such work does not constitute such commerce. (*McKee v. Ohio Electric Railway Co.*, West Virginia Supreme Court of Appeals, 88 S. E. 616.)

[fol. 37] The remaining question as to whether or not plaintiffs were engaged in the production of goods for commerce must necessarily be answered in the negative. The construction of new abutments and the making of repairs to the superstructures of the railroad bridges did not constitute "the production of goods for commerce" within the meaning of the act. From the definition of the term "goods" as found in the act, no inference may be drawn that these plaintiffs were engaged in the production of goods, products or commodities for commerce. Plaintiffs were not employed in producing, manufacturing, mining, handling

or in any other manner working on goods for commerce, nor performing any act of production as contemplated by Section 3 of the act. In performing work upon these abutments and superstructures, plaintiff were not engaged in work upon a subject of commerce, but, at best, upon an instrumentality of commerce. They were engaged in the construction of bridge abutments and the repair of bridge superstructures and were not functioning in the production of goods destined for interstate shipment. (*Fleming v. Arsenal Building Corporation, et al.*, 38 F. S. 207; *Killingbeck v. Garment Center Capitol, Inc.*, 259 App. Div. 691.) Nor were these plaintiffs employees of a manufacturer engaged in the production of goods for commerce. The defendant here was merely a contractor engaged in local construction and repair work for the railroad corporation.

The judgment dismissing the complaint upon the merits should be affirmed, with costs.

[fol. 38] DISSENTING OPINION

351/22.

BLISS, J. (dissenting):

This action is brought by the plaintiff in behalf of himself and thirty-three other employees of the defendant to recover pay and a half for overtime worked by them in excess of the forty-four hour week prescribed by the United States Fair Labor Standards Act of 1938 (29 U. S. C. A. § 216), together with liquidated damages under the act.

The facts are stipulated. Defendant had a contract with the New York Central Railroad Company as lessee of the Boston and Albany Railroad Company for the construction of new abutments under two railroad bridges and repairing the superstructures of two other bridges. These abutments had been completely washed out and destroyed and the substructures of the other bridges had been damaged by the flood of September, 1938. The construction of the new abutments constituted about two-thirds of the total work performed by the defendant under this contract and the repairs of the superstructures of the other two bridges constituted the remainder of the work. The Boston and Albany Railroad operated trains between New York and Massachusetts over these four bridges and its tracks were carried on the superstructures of all of the bridges while

the new abutments were being built at two of the bridges and the repairs were being made to the substructures of the other two, but the new abutments were not used to support the superstructures of the two bridges, nor the railroad roadbed, nor by the railroad company in any way at any [fol. 39] time while defendant was engaged in any performance of the work under the contract. After all of the work under the contract had been completed the railroad company inspected and accepted it and thereafter the railroad lowered the superstructures of the two bridges upon the new abutments and all of the bridges have been used by the railroad ever since and over which it has operated trains between New York and Massachusetts. In the performance of the work under the contract the plaintiff and the workmen whom he represents, worked overtime in excess of forty-four hours per week. Apparently they were paid for this overtime at their regular hourly rate instead of the pay and a half for overtime claimed by them.

The plaintiffs base their claim upon the Federal Fair Labor Standards Act of 1938 (U. S. C. A. Title 29, ch. 8). Sec. 206 of this act provides that every employer "shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce, wages at" certain rates. Sec. 207 provides that no employer shall, with certain exceptions not applicable here, "employ any of his employees who are engaged in commerce or in the production of goods for commerce" for a work week longer than forty-four hours during the first year from the effective date of the statute unless such employee receives compensation for his employment in excess of these hours at a rate not less than one and one-half times the regular rate at which he is employed. The term "commerce" as used in this statute is defined to include transportation, transmission or communication among the several states (Sec. 203), or [fol. 40] what would be commonly termed "interstate commerce." This case thus crystalizes upon a determination as to whether or not these employees were engaged in transportation among the several states, which is interstate commerce, for it is obvious that they were not engaged in the production of goods for interstate commerce.

That the railroad with which the defendant had its contract was engaged in interstate is not and cannot be questioned. Likewise it is now no longer open to doubt that the

construction of new bridges which may be later dedicated to use in interstate commerce is not in itself interstate commerce. Such constructions is said to be local in its operations and not interstate. *(Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43; *Gen. Ry. Signal Co. v. Comm. of Va.*, 246 U. S. 500; *McKee v. Ohio Valley Electric Ry. Co.*, 88 S. E. [W. Va.] 616.)

The case of *Pedersen v. D. L. & W. R. R. Co.* (229 U. S. 146), seems to be controlling here. It was there held that the work of keeping a railroad bridge in repair while used by a railroad in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The Court said:

"That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged or was it so closely connected therewith [fol. 41] as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the

business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (See *McCall v. California*, 136 U. S. 104, 109, 111, 34 L. ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second Employers' Liability Cases [*Mondou v. New York*, [fol. 42] *N. H and H. R. Co.*], 223 U. S. 6, 59, 56 L. ed. 329, 350, 38 L. R. A. [N. S.] 44, 32 Sup. Ct. Rep. 169; *Zikes v. Oregon R. & Nav. Co.*, 179 Fed. 893, 897, 898; *Central R. Co. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901; *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665; *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.) Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The bridges which were being repaired by the plaintiff had already been dedicated to and used in interstate commerce. They had become instrumentalities of such commerce. Keeping them in a usable condition was necessary to the interstate commerce in which the railroad was engaged. When portions of them were destroyed or no longer usable, it was necessary to replace them with new parts and the installation of these new parts cannot be put in the same class as the building of a wholly new structure. We conclude, therefore, that the installation of these new abutments and repairs to the substructures were acts which so closely related to the interstate commerce in which the structures were already being used as to be a part of it.

The Fair Labor Standards Act makes the employee's duties the test as to whether the act applies. The fact that the railroad had entered into a contract for the repair of these bridges with an independent contractor does not deprive workmen engaged in the work of the benefits of the [fol. 43] act. (*State v. Bates & Rogers Const. Co.*, 91 Wash. 181; 157 Pac. 482.) If this were not so, it would be possible for a railroad engaged in interstate commerce to thus contract with an independent contractor for the performance of many other of its operations in interstate commerce and thus avoid federal jurisdiction over such operations. As was stated in the *Pedersen* case and quoted above: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is

engaged?'' The conclusion here seems irresistible that the workmen who were repairing these four railroad bridges were actually participating in the interstate business of the railroad. If these workmen were employed by the railroad itself there would be no question but what they were engaged in interstate commerce, because they were repairing structures already being used in such commerce and such work was so closely connected with the interstate commerce of the railroad as to be a part of it. The intrinsic nature and indispensable character of such work to interstate transportation were not altered by the interposition of the fact that such work was being performed through an independent contractor. It was still as much a part of and necessary to interstate commerce as it would have been if the railroad were doing the work itself. If we are correct in this conclusion, then clearly the men who were repairing the bridges came within the provisions of the Federal Fair Labor Standards Act as they were engaged in interstate commerce.

The judgment should be reversed on the law and facts, with costs, and judgment directed for the plaintiff.

[fol. 44] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—November 27, 1941

SIRS:

Please Take Notice that the above named plaintiff-appellant hereby appeals to the Court of Appeals from the judgment of affirmance herein entered in the office of the clerk of the County of Columbia on the 15th day of November, 1941, pursuant to the order of the Appellate Division of the Third Judicial Department, duly entered herein, which judgment affirmed the judgment of the Supreme Court of the County of Columbia, entered herein on the 18th day of March, 1940.

Dated: November 27, 1941.

Wilson & Connor, Attorneys for Plaintiff-Appellant,
Office and Post Office Address, 609 Warren Street,
Hudson, New York.

To: Whalen, McNamee, Creble & Nichols, Esqs., Attorneys for Defendant-Respondent, 75 State Street, Albany, New York. Grant A, Miller, Esq., Clerk of the County of Columbia, Hudson, New York.

(End of Former Record on Appeal)

[fol. 45] IN SUPREME COURT OF NEW YORK

ORDER ON REMITTITUR—June 19, 1942

At a Special Term of the Supreme Court Held in and for the County of Albany, at the Court House in the City of Albany on the 19th day of June, 1942.

Present: Hon. Riley H. Heath, Justice.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court, Third Department, entered in the above entitled action on November 15, 1941, in the office of the Clerk of the County of Columbia, which judgment affirmed the judgment herein, dismissing the complaint entered in the office of the Clerk of said County on March 18, 1940, and said appeal having been duly argued in said Court of Appeals and, after due deliberation, said Court of Appeals having ordered and adjudged that the said judgment so appealed from, as aforesaid, be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Riley H. Heath, Justice Supreme Court.

Enter in Columbia County.

[fol. 46] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

JUDGMENT ON REMITTITUR—June 20, 1942

A judgment in the above entitled action having been entered in the office of the Clerk of Columbia County on November 15, 1941, upon the order of the Appellate Division of the Supreme Court, Third Department, affirming the judgment herein dismissing the complaint, entered in the office of the Clerk of Columbia County on March 18, 1940, and the above named plaintiff having appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and said Court of Appeals having sent to this Court its remittitur, filed herewith, from which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court, by an order entered herein this day having ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the costs of the defendant having been duly taxed at the sum of One Hundred Forty-one Dollars ($141.00),

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that said judgment of the Appellate Division be, and the same hereby is, in all things, affirmed, and that the defendant recover of the plaintiff the sum of One Hundred Forty-one Dollars ($141.00), its costs as taxed, and that execution issue accordingly.

Dated: June 20, 1942.

Grant A. Miller, Clerk.

[fol. 47] MANDATE OF UNITED STATES SUPREME COURT—March 18, 1943

UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable the Judges of the Supreme Court of the State of New York, Columbia County, Greeting:

Whereas, lately in the Supreme Court of the State of New York, Columbia County, before you, or some of you, in a cause between Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and all other Employees of the Defendant Similarly Situated, Plaintiff, and J. F. Fitzgerald Construction Company, Defendant, wherein the judgment of the said Supreme Court entered in said cause on the 20th day of June, A. D., 1942, on the remittitur from the Court of Appeals, is in the following words, viz:

"A judgment in the above entitled action having been entered in the office of the Clerk of Columbia County on November 15, 1941, upon the order of the Appellate Division of the Supreme Court, Third Department, affirming the judgment herein dismissing the complaint, entered in the office of the Clerk of Columbia County on March 18, 1940, and the above named plaintiff having appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and said Court of Appeals having sent to this Court its remittitur, filed herewith, from which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division with costs and has given judgment accordingly, and has remitted the judg-[fol. 48] ment of said Court of Appeals to this Court to be enforced according to law, and this Court, by an order entered herein this day having ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the costs of the defendant having been duly taxed at the sum of One Hundred Forty-one Dollars ($141.00),

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that said judgment of the

Appellate Division be, and the same hereby is, in all things, affirmed, and that the defendant recover of the plaintiff the sum of One Hundred Forty-one Dollars ($141.00), as costs as taxed, and that execution issue accordingly."

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided fully and at large appears.

And Whereas, in the present term of October in the year of our Lord one thousand nine hundred and forty-two, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was duly submitted:

On consideration Whereof, it is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs [fol. 49] on the authority of Overstreet v. North Shore Corporation, 284, decided February 1, 1943.

And it is further ordered that the said plaintiff, Chris Pedersen, individually and as Agent, etc., recover against the said defendant Seventy-nine Dollars and Thirty Cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought.

February 8, 1943

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of New York, Columbia County, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding.

Witness the Honorable Harlan F. Stone, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand nine hundred and forty-three.

Costs of plaintiff
Clerk $59.30
Attorney $20.00

$79.30

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 50] IN SUPREME COURT OF NEW YORK

ORDER ON MANDATE—April 20, 1943

At a Trial Term of the Supreme Court held in and for the County of Albany, at the Court House in the City of Albany, on the 20th day of April, 1943.

Present: Hon. Harry E. Schirick, Justice.

[Same Title]

A judgment dismissing the complaint of the plaintiff herein having been duly entered in the office of the clerk of the County of Columbia on the 18th day of March, 1940, and the said judgment dismissing the complaint of the plaintiff having been affirmed by the Appellate Division, Third Department of the State of New York, and the Court of Appeals of the State of New York, and a judgment against the plaintiff having been entered on the 15th day of November, 1941, in the office of the clerk of the county of Columbia upon an order of the Appellate Division of the Supreme Court affirming the judgment of the Supreme Court of the State of New York, and a judgment having been entered in the office of the clerk of the county of Columbia on the 20th day of June, 1942, affirming the judgment and order of the Appellate Division, Third Department, and the above named plaintiff having appealed to the United States Supreme Court from the judgment of the Court of Appeals as remitted to the Supreme Court of the State of New York and from the judgment and order upon remittitur from the Court of Appeals by the Supreme Court of the

State of New York, and the said United States Supreme [fol. 51] Court having sent to this Court its mandate wherein and whereby it was provided as follows:

"It is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs

"And it is Further Ordered that the said plaintiff, Chris Pedersen, individually and as Agent, etc., recover against the said defendant Seventy-nine Dollars and Thirty Cents for his costs herein expended and have execution therefor.

"And it is Further Ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought.

"And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of New York, Columbia County, in order that such execution and further proceedings may be had in the cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding."

Now, on reading and filing the mandate from the United States Supreme Court herein, and on motion of Wilson & Connor, Esqs., attorneys for the plaintiff,

[fol. 52] It is Ordered that said order and judgment and mandate of the United States Supreme Court be, and the same hereby are, made the judgment of this Court.

Harry E. Schirick, Justice Supreme Court.

Enter in Columbia County.

In Supreme Court of New York, Columbia County.

Judgment on Mandate—April 20, 1943

A judgment dismissing the complaint of the plaintiff herein having been duly entered in the office of the clerk of the county of Columbia on the 18th day of March, 1940, and said judgment dismissing the complaint of the plaintiff

having been affirmed by the Appellate Division, Third Department of the State of New York, and the Court of Appeals of the State of New York, and a judgment against the plaintiff having been entered on the 15th day of November, 1941, in the office of the clerk of the county of Columbia upon an order of the Appellate Division of the Supreme Court affirming the judgment of the Supreme Court of the State of New York, and a judgment having been entered in the office of the clerk of the county of Columbia on the 20th day of June, 1942, affirming the judgment and order of the Appellate Division, Third Department, and the above named plaintiff having appealed to the United States Supreme Court from the judgment of the Court of Appeals as [fol. 53] remitted to the Supreme Court of the State of New York and from the judgment and order upon remittitur from the Court of Appeals by the Supreme Court of the State of New York, and the said United States Supreme Court having sent to this Court its mandate wherein and whereby it was provided as follows:

"It is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs

"And it is Further Ordered that the said plaintiff, Chris Pedersen, individually and as Agent, etc., recover against the said defendant Seventy-nine Dollars and Thirty Cents for his costs herein expended and have execution therefor.

"And it is Further Ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought.

"And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of New York, Columbia County, in order that such execution and further proceedings may be had in the cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding."

[fol. 54] And this Court by order made this day having ordered said judgment and order and mandate of the

United States Supreme Court be made the judgment of this court, and the costs of the plaintiff having been duly taxed at the sum of Six Hundred Twenty-Six Dollars and Sixty-three Cents ($626.63),

Now, on motion of Wilson & Connor, Esqs., attorneys for the plaintiff, it is

Adjudged that said judgment, order and mandate of the United States Supreme Court be and the same hereby are made the order and judgment of this court, and the said judgment dismissing the complaint is hereby reversed without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought, and that the plaintiff recover of the defendant the sum of Six Hundred Twenty-Six Dollars and Sixty-three Cents ($626.63), his costs as taxed and that execution issue accordingly.

Dated: April 20, 1943.

Grant A. Miller, Clerk, by Harold I. Hall, Deputy.

[fol. 55] IN SUPREME COURT OF NEW YORK

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

SIRS:

Please Take Notice, that upon the record on appeal, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court, the mandate of the United States Supreme Court herein, and all other papers and proceedings herein, the above named defendant will move this Court at a Special Term thereof appointed to be held in and for the County of Albany at the County Court House in the City of Albany, New York, on May 14, 1943, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for judgment dismissing the complaint and for such other, further and different relief in the premises as may be proper.

Dated: May 3, 1943.

Whalen, McNamee, Creble & Nichols, Attorneys for Defendant, Office and Post Office Address, 75 State Street, Albany, New York.

To Wilson & Connor, Esqs., Attorneys for Plaintiff.

[fol. 56] IN SUPREME COURT OF NEW YORK

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT—May 21, 1943

At a Special Term of the Supreme Court Held in and for the County of Rensselaer, at the County Court House in the City of Troy, New York, on May 21, 1943

Present: Hon. Sydney F. Foster, Justice.

The above named defendant having duly served a notice of motion dated May 3, 1943, for judgment dismissing the complaint herein, returnable at a Special Term of this Court to be held in the County of Albany on May 14, 1943, and said motion having been duly adjourned to this Term of Court, and the defendant having appeared by Whalen, McNamee, Creble & Nichols, Esqs., its attorneys, in support of said motion, and plaintiff having appeared by Wilson & Connor, Esqs., his attorneys, in opposition thereto, and upon reading and filing said notice of motion, the record on appeal herein, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court and the mandate of the United States Supreme Court herein, and all other papers and proceedings herein, and after due deliberation,

Now, on motion of Wilson & Connor, Esqs., attorneys for the plaintiff, it is

Ordered, that said motion made by the defendant for a dismissal of the complaint be, and the same hereby is, denied without costs.

Sydney F. Foster, Justice Supreme Court.

Enter in Columbia County.

[fol. 57] IN SUPREME COURT OF NEW YORK

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT—May 3, 1943

SIRS:

Please Take Notice that upon the annexed affidavit of William E. J. Connor, sworn to the 23rd day of March, 1943, the mandate of the United States Supreme Court dated

February 8, 1943, the order of the Supreme Court of the State of New York on remittitur made the 20th day of April, 1943, and entered in the office of the clerk of the county of Columbia on the 20th day of April, 1943, the judgment on remittitur of the Supreme Court of the State of New York, made the 20th day of April, 1943, duly entered in the office of the clerk of the county of Columbia on the 20th day of April, 1943, upon the record on appeal and all other papers and proceedings herein, the above named plaintiff will move this court at a special term thereof to be held in and for the County of Albany at the County Court House in the City of Albany, New York on the 14th day of May, 1943, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for summary judgment in favor of the plaintiff and against the defendant, in accordance with the provisions of Rule 113 of the Rules of Civil Practice, and for such other and further relief as to the court may seem just and proper, together with the costs of this motion.

Affidavits to be used in answering the plaintiff's application must be served at least five days before the hearing.

Dated Hudson, N. Y., May 3, 1943.

Wilson & Connor, Attorneys for Plaintiff, Office & P. O. Address, 609 Warren Street, Hudson, New York.

[fol. 58] To: Whalen, McNamee, Creble & Nichols, Esqs., Attorneys for defendant, Office and P. O. Address, 75 State Street, Albany, N. Y.

IN SUPREME COURT OF NEW YORK

PLAINTIFF'S MOVING AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of Columbia,
City of Hudson, ss:

William E. J. Connor, being duly sworn, deposes and says that he is an attorney and counsellor at law residing in Philmont, New York, and one of the members of the law firm of Wilson & Connor, with office at 609 Warren Street in the city of Hudson, New York. That he is one of the attorneys for the plaintiff in the above entitled matter and since the

16th day of January, 1941, he has had charge of the above entitled litigation.

That on the 16th day of January, 1941, Ransom H. Gillett, an attorney and counsellor at law who resided in the town of New Lebanon and practiced his profession in the city of Albany, County of Albany, New York, died, and your deponent was retained by Ida Mott Gillett, his wife, to settle the estate and take over the practice of the said Ransom H. Gillett and complete any business needing completion. That among the files in the said Ransom H. Gillett's office was the [fol. 59] above entitled file. At that time the file in the above entitled matter indicated that Ransom H. Gillett had done a considerable amount of work on this case. The file even then was very voluminous. The action had been tried in the Supreme Court of the County of Columbia before Mr. Justice Bergan on an agreed statement of facts. The file indicated that in order to compute and ascertain the amount of monies due some forty (40) workmen had required a considerable amount of time, attention and effort. The file indicated that the said Ransom H. Gillett had done considerable research work and had filed a lengthy brief with Mr. Justice Bergan. At that time Mr. Justice Bergan had written an opinion and judgment dismissing the complaint had been entered against the plaintiff.

That the said Ransom H. Gillett had filed a notice of appeal to the Appellate Division of the Third Department. The action had been commenced on the 15th day of June, 1939. While the said Ransom H. Gillett had filed a notice of appeal, this is apparently as far as he had gone with the matter and had not perfected the appeal. Your deponent at that time, together with Mr. William M. Eaton, an attorney and counsellor at law, and formerly of the City of Hudson, County of Columbia and State of New York, and now with the United States Armed Forces, made a thorough investigation of the file and a hurried study of the law applicable to the case, after which both your deponent and Mr. Eaton were convinced that there was a possibility of reversing the decision of Mr. Justice Bergan. Your deponent then prepared the case for appeal, prepared the record on ap- [fol. 60] peal, and prepared a brief on the subject. In order to prepare for the argument of this case your deponent was obliged to spend many days and weeks on the matter due to the fact that the case was brought under the Federal Fair

Labor Standards Act of 1938, and at that time no decisions had reached the United States Supreme Court and it was necessary to examine the law on other similar statutes and to make comparisons of them with the new Federal Fair Labor Standards Act. And in order to do this it was necessary on many occasions for your deponent and his partner Harold Wilson Jr. and Mr. Eaton to go to the City of Albany to use the New York State Law Library since the Columbia County Supreme Court library and other *other* libraries in the city of Hudson were not adequate for the purposes. Moreover, there were a great number of cases being decided all over the United States in the lower Federal courts and since the action could be brought either in Federal or State courts, there were a great many cases being tried in the courts of our sister states and it was necessary to follow these decisions in the states courts and in the lower Federal courts. Your deponent was constantly, throughout the years that this case has been before all of the Courts, corresponding with various attorneys in the United States to keep in contact with many cases on the subject that were being litigated.

Your deponent then argued the case before the Appellate Division and the Appellate Division by a vote of 3-2 sustained Mr. Justice Bergan, Mr. Justice Schenck writing the prevailing opinion of the Court, and Mr. Justice Bliss writ- [fol. 61] ing the dissenting opinion. Your deponent then prepared a notice of appeal to the Court of Appeals of the State of New York, and prepared briefs in the Court of Appeals of the State of New York. In all of the courts before which this has been argued counsel for the defendant served voluminous briefs containing many cases, all of which had to be studied carefully in order to point out any distinctions which might exist. In fact, as the law under the Federal Fair Labor Standards Act began to become settled by the higher Courts of the State and Federal government, and finally by the United States Supreme Court, one by one all of the different arguments raised by counsel for the defendant seemed to be wiped out and each time counsel for defendant would raise new, different and unique reasons for depriving the men whom your deponent represents of the wages due them under the Federal Fair Labor Standards Act, and to cope with such prominent and eminent attorneys required constant study and vigilance.

After the filing of brief and reply brief in the Court of Appeals, your deponent argued the case before the Court of Appeals of the State of New York. In fact your deponent got out of a sick bed against doctor's orders in order to do so. The Court of Appeals, without opinion and unanimously, affirmed the prevailing decision of the Appellate Division, and judgment against the plaintiff with costs was again entered in the Columbia County Clerk's office.

Your deponent was still convinced that the men employed in the repair of a railroad bridge on an interstate railroad [fol. 62] were entitled to the wages fixed by the Federal Fair Labor Standards Act and your deponent then began to prepare to carry the case to the United States Supreme Court. Your deponent was not at that time admitted to practice before the United States Supreme Court and one of the difficult problems placed before your deponent was that the United States Supreme Court was not at that time in session and would not be in session by the time that a writ of certiorari would be required to be filed in the United States Supreme Court. Being unfamiliar with the practice in the United States Supreme Court again required considerable study and work on the part of your deponent and your deponent finally found himself in the position where the only way that the case could be taken to the United States Supreme Court was by having some attorney admitted to practice in the United States Supreme Court collaborate with him on the case. Your deponent then retained Daniel H. Prior, Esq., attorney and counsellor at law of the City of Albany, New York, who was admitted to practice in the United States Supreme Court, to assist him in the case and file the case in his name. Your deponent prepared the writ of certiorari and the brief upon the application for writ of certiorari to the United States Supreme Court, and made several telephone calls to Washington, D. C., to make sure of the proper procedure. The preparation of this brief on the writ of certiorari again required considerable study since on the brief in opposition to the application for a writ of certiorari entirely new and different arguments were raised why the writ should not be granted.

[fol. 63] As soon as the United States Supreme Court convened your deponent went to Washington, D. C., and was admitted to practice before the United States Supreme Court. To do this it was necessary to obtain someone from Washington, D. C., to move your deponent's admission.

All of this required considerable expense, took your deponent away from his office, and his purpose of being admitted to the United States Supreme Court was solely for the purpose of arguing the above entitled case, since your deponent doubts very much that he will ever again have a case in the United States Supreme Court since the records show that no other case in Columbia County in over one hundred years has ever reached the United States Supreme Court.

Your deponent and the said William M. Eaton, as well as the other members of the firm of Wilson & Connor and their associates have done and performed many other acts and services and work in connection with this case not outlined for the reason that the same would make this affidavit too voluminous, because it is believed that the Court can readily see that a case involving the amount of money that the same does, and the nature of the case itself, and the fact that the case has been at issue for nearly four years, has gone through all of the Courts of the State and finally to the United States Supreme Court, and even to the point of an application for a rehearing in the United States Supreme Court, has required considerable work and that the fair and reasonable value of the attorneys' fees should be in a substantial sum. Under the Federal Fair Labor Standards Act the plaintiffs in this action are entitled not only to recover the amount due them for wages, and [fol. 64] another amount for penalty, but they are entitled to recover from the defendant the fair and reasonable value of the attorneys' fees, and it is for this reason that this affidavit is made.

At the present time the plaintiffs are entitled to recover for wages and the penalties and court costs with interest approximately Eleven Thousand ($11,000.00) Dollars, and your deponent believes that the fair and reasonable value of the attorneys' fees is Six Thousand ($6,000.00) Dollars.

William E. J. Connor.

Sworn to before me this 23rd day of March, 1943. Mae Weinstein Commissioner of Deeds Hudson, N. Y.

[fol. 65] IN SUPREME COURT OF NEW YORK

ORDER GRANTING SUMMARY JUDGMENT—May 21, 1943

At a Special Term of the Supreme Court held in and for the County of Rensselaer, at the County Court House in the City of Troy, N. Y., on the 21st day of May, 1943.

Present: Hon. Sydney F. Foster, Justice.

Upon reading and filing the notice of motion herein bearing date the 3rd day of May, 1943, the affidavit of William E. J. Connor, sworn to the 23rd day of March, 1943, the summons and complaint and answer of the defendant herein, the mandate of the United States Supreme Court herein, the judgment of the Supreme Court of the State of New York dated the 20th day of April, 1943, and upon further reading all papers and proceedings heretofore had herein, it satisfactorily appearing therefrom that the defendant has not shown such facts as to entitle it to further defend this action, now after hearing William E. J. Connor, Esq., of Wilson and Connor, in support of the motion, and Henry E. Foley, Esq., arguing for Whalen, McNamee, Creble & Nichols, Esqs., in opposition thereto, and after having studied the briefs concerning the proposition herein involved, and after due deliberation thereon, now on motion of Wilson and Connor, attorneys for the plaintiff, it is

Ordered, that the plaintiff's motion for summary judgment against the defendant herein, under Rule 113 of the Rules of Civil Practice, be and the same hereby is granted, and the answer of the defendant is hereby stricken out, and [fol. 66] judgment is directed for the plaintiff against the defendant for the sum of Seven thousand one hundred and eighty-six and 72/100 dollars ($7,186.72), with interest thereon from the 1st day of April, 1939, together with costs in the Supreme Court of the State of New York, the Appellate Division, Third Department of the State of New York, and the Court of Appeals of the State of New York, together with attorneys' fees as provided in Fair Labor Standards Act, Section 216, in the sum of Three thousand dollars ($3,000), together with Ten dollars ($10) costs of this motion.

Sydney F. Foster, Justice of the Supreme Court.

[fol. 67] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

JUDGMENT—June 16, 1943

The above entitled action having been tried on an agreed statement of facts in the Supreme Court of the State of New York, and a judgment having been heretofore made dismissing the complaint, and the plaintiff having appealed to the Appellate Division, Third Department, of the State of New York, and the Court of Appeals of the State of New York, and a writ of certiorari having been granted by the United States Supreme Court, and the mandate of the United States Supreme Court having been filed in this office, and the motion having been made by the plaintiff for an order striking out the answer of the defendant and for judgment against the said defendant, and said motion having been granted by an order of this court at a Special Term thereof held on the 21st day of May, 1943, which order has been this day duly filed and entered in the office of the Clerk of Columbia County, now on motion of Wilson and Connor, attorneys for the plaintiff, it is

Adjudged, that the plaintiff recover of the defendant the sum of Seven thousand one hundred eighty-six and 72/100 dollars ($7,186.72) with interest thereon from the 1st day of April, 1939, amounting to One thousand eight hundred twenty-four and 30/100 dollars ($1,824.30), together with costs in the sum of Five hundred fifty-seven and 33/100 dollars ($557.33), together with attorneys' fees in the sum of Three thousand dollars ($3,000), amounting in all to Twelve thousand five hundred sixty-eight and 35/100 dollars ($12,568.35), with interest thereon from date, and that execution issue accordingly.

Dated, June 16, 1943.

Grant A. Miller, Clerk.

[fol. 68] IN SUPREME COURT OF NEW YORK

OPINION OF SPECIAL TERM

(Supreme Court, Rensselaer Special Term, May 21, 1943)

Appearances:

Wilson & Connor, Esqs. (William E. J. Connor, of counsel), Attorneys for plaintiff.

Whalen, McNamee, Creble & Nichols, Esqs. (Charles E. Nichols, of counsel) (Argued by Henry E. Foley, Esq.), Attorneys for defendant.

Memorandum

FOSTER, J.

Defendant has moved to dismiss the complaint in this action and the plaintiff has moved for summary judgment.

The action was commenced on June 15, 1939, to recover overtime wages and liquidated damages alleged to be due under provisions of the federal Fair Labor Standards Act of 1938. Plaintiff, and those he represents, were employees of the defendant, and the defendant had performed certain construction work under contract with the New York Central Railroad Company for the repair of four bridges located on the right of way of the Boston & Albany Railroad in the town of Chatham, Columbia County, New York.

The case was tried upon an agreed state of facts at a trial term of the Supreme Court in Albany County in September, 1939. The theory of the plaintiff was that he and his fellow employees were employed in interstate com- [fol. 69] merce, and thus came within the federal Act. It appears from the agreed statement of facts that abutments supporting two of the bridges involved were completely washed out and destroyed by a flood in September, 1938. The substructures of the other two bridges were damaged. The work which the defendant engaged to perform was the construction of new abutments to replace those destroyed, and to repair the substructures of the other two bridges which had been damaged. Mr. Justice Bergan, to whom the case was submitted, dismissed the complaint on the theory that the nature of the work performed by the defendant was local in character and wholly separate from interstate commerce.

An appeal from this decision was taken to the Appellate Division, Third Department, and there the decision of the trial justice was affirmed by a divided court. The conclusion reached by Mr. Justice Schenck, who wrote for a majority of the Appellate Division, was that since defendant was an independent contractor employed by the railroad to perform work local in character, and not itself engaged in interstate commerce, it followed that defendant's employees

were not engaged in such commerce or work so closely connected with it as to be a part thereof. Mr. Justice Bliss dissented on the grounds that all of the bridges involved had been dedicated to and used in interstate transportation prior to the work in question; and that repairs thereto, including the installation of new abutments as well as repairs to the substructures were acts so closely related [fol. 70] to interstate commerce as to be a part thereof. Also that it was the character of the work done which constituted the test as to whether the Fair Labor Standards Act applied and not the fact that the work was performed for the railroad through the medium of an independent contractor not itself generally engaged in interstate commerce.

The Court of Appeals unanimously and without opinion affirmed the decision of the Appellate Division. Thereafter the plaintiffs filed with the United States Supreme Court a petition for a writ of certiorari wherein they sought to review the judgment of dismissal. The United States Supreme Court granted the certiorari and entered an order directing that the judgment be reversed on the authority of *Overstreet v. North Shore Corporation* (No. 284, October Term 1942). The mandate of the Supreme Court of the United States directed that the cause be remanded to the Supreme Court of New York for further proceedings not inconsistent with its opinion. Thereafter this order was modified by adding the following direction: "Without prejudice to the determination of the nature of the employment of any members of the class on whose behalf this suit has been brought."

It is the contention of the defendant that the complaint should be dismissed because the agreed statement of facts does not reveal the individual activity and precise work of any particular plaintiff. The Overstreet case held generally that the same practical test evolved in cases arising under the Federal Employers' Liability Act (prior to the amend- [fol. 71] ment of 1939) should be applied to cases arising under the Fair Labor Standards Act when it became necessary to determine whether an employee was engaged in interstate commerce or any work so closely related to such commerce as to be in practice and legal contemplation a part of it. It also held that the nature of the employer's business is not determinative; that application of the Act de-

pends wholly upon the character of the employees' activities. Defendant cites a large number of cases to sustain the proposition that under the Federal Employers' Liability Act it is necessary for the plaintiff to show his precise activity at the time of injury before there can be a determination that he was engaged in interstate commerce (*Shanks v. Delaware, Lackawanna & Western Railroad Company*, 239 U. S. 556; *Chicago and North Western Railway Company v. Bolle*, 284 U. S. 74; *Chicago and Eastern Illinois Railroad Company v. Industrial Commission of Illinois, et al.*, 284 U. S. 296; *Stoike v. First National Bank of City of New York*, 290 N. Y. 195).

There is no room for argument as to what these decisions hold. The chief difficulty lies, as always, in their application to a given case. It is one thing to apply them to a fixed moment, like the time of an injury, and quite another thing to apply their principles to a group of men over a period of several weeks. If the test is to be applied rigidly it would be necessary for each complaining employee to account for every second of every minute and every minute of every hour, for the time of work takes the place of the time of injury. Obviously such a test is not practical in [fol. 72] any sense of the word and the decision in the Overstreet case does not require so narrow a construction. In a case such as this the test must necessarily be whether the activities of complaining employees were substantially related to the repair of interstate transportation facilities. I mention these matters because I think they have a very definite bearing on a fair construction of the agreed statement of facts.

The pertinent facts are these:

"(2) In September 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by flood.

(3) Thereafter, the railroad company entered into a contract with the defendant, * * * * for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

(6) Defendant employed plaintiffs * * *, as its employees in doing work under contract."

The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing *this particular work*. During the course of this litigation defendant's chief emphasis was placed upon the alleged local character of the work by an independent contractor not itself engaged in interstate commerce, with subordinate emphasis placed upon the fact that work on the [fol. 73] abutments was new construction. To the contrary plaintiff's emphasis was placed upon the claim that the entire work was a repair job to an interstate transportation system irrespective of the fact that the work was undertaken by an independent contractor. I do not find that lack of information concerning the hourly or daily activities of each employee was made a point of attack until the decision of the United States Supreme Court came down, and I think that both parties assumed the construction of the conceded facts which I have indicated. But in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (*Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made. It is now clear that any distinction between the installation of new abutments and repairs to substructures is immaterial. Otherwise the Supreme Court would have noted such a distinction.

Nor do I regard the modification by the Supreme Court of its original mandate as of vital significance insofar as the foregoing conclusions are concerned. Such modification was granted after a petition by the defendant for a rehearing. It was no more a direction to the plaintiff than it was a permission to the defendant to reopen the matter, if either so desired, and could so do under our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates. A new trial was not directed, and in no sense do I regard the modification as a finding that the agreed facts were insufficient upon [fol. 74] which to base a judgment.

Under the circumstances the motion to dismiss the complaint should be denied without costs, and the motion by

plaintiff for summary judgment should be granted with $10.00 costs of the motion. Plaintiff and those he represents may have judgment for overtime wages, as covered by the agreed statement of facts and as found on the original trial, plus an equal amount as liquidated damages, with costs of the action to date in all courts except the Supreme Court of the United States. Costs in that court have been provided for separately. The federal statute provides that, in addition to such a judgment, a reasonable attorney's fee must be allowed, and apparently does not require proof to be taken in order to fix the same (Fair Labor Standards Act, Section 216). Under the circumstances I think a fee of $3,000 is not unreasonable.

June 8, 1943.

[fols. 75-76] In Supreme Court of New York

Stipulation Waiving Certification

It Is Hereby Stipulated, pursuant to Rule 234, that the foregoing are true and correct copies of the notice of appeal, the original record on appeal, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court, the mandate of the United States Supreme Court, plaintiff's notice of motion for summary judgment, defendant's motion for judgment dismissing complaint, all opinions rendered herein, and all papers upon which the Special Term acted in granting the order and judgment appealed from, the order and judgment appealed from and the order denying defendant's motion also appealed from, all of which are on file in the office of the Clerk of Columbia County, together with copy of opinion of Special Term, and certification thereof by the Clerk of Columbia County is hereby waived.

Dated: July —, 1943.

Wilson & Connor, Attorneys for Respondent; Whalen, McNamee, Creble & Nichols, Attorneys for Appellant.

[fol. 77] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—January 10, 1944

SIRS:

Please Take Notice that the above named defendant, J. F. Fitzgerald Construction Company, hereby appeals to the Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court, Third Department, entered in the above entitled action on November 23, 1943, in the office of the Clerk of the County of Columbia, upon an order of said Appellate Division made at a term thereof commencing September 13, 1943, and entered in the office of the Clerk of said Appellate Division on November 18, 1943, whereof a certified copy was entered in said County Clerk's office on November 23, 1943, which order and judgment of said Appellate Division affirmed with costs the judgment herein entered in the office of the Clerk of the County of Columbia on June 16, 1943, [fol. 78] and an order entered in the same Clerk's office on the same day granting summary judgment in favor of plaintiff against defendant, and an order entered in the same Clerk's office on June 18, 1943, denying defendant's motion to dismiss the complaint, and said defendant appeals from each and every part of said judgment of said Appellate Division and from the whole thereof.

Dated: January 10, 1944.

Yours, etc., Whalen, McNamee, Creble & Nichols, Attorneys for Defendant, Office & Post Office Address, 75 State Street, Albany, New York.

To: Wilson & Connor, Esqs., Attorneys for Plaintiff and Clerk of the County of Columbia.

[fol. 79] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

[Title omitted]

ORDER OF APPELLATE DIVISION—November 18, 1943

The appeal taken by the above appellant from a judgment herein entered in Columbia County Clerk's office on June

16, 1943, and from an order entered in the Columbia County Clerk's office on June 16, 1943, granting summary judgment, [fol. 80] and from an order entered June 18, 1943, denying respondent's motion to dismiss the complaint, having been argued at this term of the Court on behalf of the appellant by Henry E. Foley, Esq., of counsel for Whalen, McNamee, Creble, & Nichols, and by William E. J. Connor, Esq., of counsel for Wilson & Connor, attorneys for the respondent, and after due deliberation this Court having handed down its decision herein on November 10, 1943,

Now, on motion of Wilson & Connor, attorneys for the respondent, it is ordered that the order entered June 18, 1943, denying appellant's motion to dismiss the complaint be and same hereby is affirmed with $10.00 costs and disbursements,

And on motion of Wilson & Connor, attorneys for the respondent, it is, with Mr. Justice Schenck dissenting, ordered that the judgment and order of June 16, 1943, appealed from be and the same hereby are affirmed with costs to the respondent.

John S. Herrick, Clerk.

A true copy.
John S. Herrick, Clerk. (Seal.)
Ent. 11/18/43.

[fol. 81] Sir:

Take notice of an Order of which the within is a copy, duly granted in the within entitled action on the 13th day of Sept., 1943, and duly entered in the office of the Clerk of the County of Columbia on the 23rd day of Nov., 1943.

Dated: Hudson, N. Y., November 23, 1943.

Wilson & Connor, Attorneys for Plaintiff, Office and Post Office Address, 609 Warren Street, Hudson, New York.

[fol. 82] In Supreme Court of New York, Columbia County

[Title omitted]

Judgment on Order of Appellate Division—November 23, 1943

The above named defendant having appealed to the appellate Division of the Supreme Court, Third Department,

from the judgment in the above entitled action duly entered in the Columbia County Clerk's office on the 16th day of June, 1943, and from an order entered in the Columbia County Clerk's office on June 16, 1943, granting summary judgment, and from an order entered June 18, 1943, denying respondent's motion to dismiss the complaint, and said Appellate Division, by its Order entered in the office of the Clerk thereon on November 18th, 1943, a certified copy of which, together with the original Record on Appeal, has has been this day filed in the office of said County Clerk, having affirmed with costs to the plaintiff against the defendant said judgment and orders so appealed from, and said plaintiff's costs having been duly taxed at the sum hereinafter stated,

[fol. 83] Now, on motion of Wilson & Connor, attorneys for the plaintiff, it is

Adjudged that said judgment entered in the office of the Clerk of the County of Columbia on June 16, 1943, and said order entered in the Columbia County Clerk's office on June 16, 1943, granting summary judgment, and said order entered June 18, 1943, denying respondent's motion to dismiss the complaint, be, and the same hereby are affirmed and that the plaintiff recover of the defendant the sum of $71.65, its costs, and that execution issue accordingly.

Dated: November 23, 1943.

Grant A. Miller, Clerk.

By Harold I. Hall, Deputy.

Sir:

Take notice of a Judgment of which the within is a copy, duly made in the within entitled action, on the 23rd day of November, 1943, and duly entered in the office of the Clerk of the County of Columbia on the 23rd day of November, 1943.

Dated: Hudson, N. Y., November , 1943.

Wilson & Connor, Attorneys for Plaintiff, Office and Post Office Address, 609 Warren Street, Hudson, New York.

[fol. 84] In Supreme Court of New York, Appellate Division—Third Judicial Department

[Title omitted]

Decison of Appellate Division

Appeal from summary judgment granted under Rule 113 of the Rules of Civil Practice and an order denying defendant's motion to dismiss the complaint. For previous history of the case see: 173 Misc. 188; 262 A. D. 665; 288 N. Y. 687; 318 U. S. 740; and 318 U. S. 742.

Judgment and orders affirmed, with costs.

Hill, P. J., Crapser, Bliss and Heffernan, JJ., Concur.

Schenck, J., dissents; in an opinion.

(No opinion written unless indicated hereon.)

[fol. 85] Dissenting Opinion in Appellate Division

Schenck, J.:

Plaintiff brought this action in his own behalf, and as representative of certain other employees of defendant, styled in the complaint as co-plaintiffs, to recover overtime wages and an equivalent amount as liquidated damages, pursuant to the provisions of sections 7 and 16 of the Federal Fair Labor Standards Act of 1938 (29 U. S. Code §§207 [a], 216 [b]). The case was first tried before Mr. Justice Bergan on an agreed statement of facts, of which the following parts are material upon this appeal:

"1. The New York Central railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right of way in the Town of Chatham, Columbia County, New York.

"2. In September, 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood.

"3. Thereafter, the railroad company entered into a contract with the defendant, an independent con-

tractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

* * * * * * *

[fol. 86] "6. Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule 'A' annexed hereto.

* * * * * * *

"10. After October 24, 1938, until the completion of said work by the defendant under said contract, each plaintiff worked for defendant the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed hereto."

Dismissal of the complaint by Mr. Justice Bergan (173 Misc. 188) was affirmed by this Court (262 App. Div. 665) and in the Court of Appeals (288 N. Y. 687).

Application by plaintiff to the Supreme Court of the United States for a review of the judgment entered upon the remittitur from the Court of Appeals resulted in the following decision (318 U. S. 740) announced February 8, 1943: "Per Curiam: Petition for writ of certiorari granted. Judgment reversed on the authority of *Overstreet v. North Shore Corporation*," which had been decided February 1, 1943 (318 U. S. 125). It is stated in plaintiff's brief on this appeal, as also on the oral argument thereof before this Court, that the reversal by the Supreme Court was without having heard argument, for which defendant thereafter applied, with the result that on March 8, 1943, the Supreme Court amended its judgment of reversal by adding thereto the following: "and without prejudice to a determination of the nature of the employ-[fol. 87] ment of any members of the class on whose behalf this suit has been brought" (318 U. S. 742). The mandate of the Supreme Court of the United States, under date of March 18, 1943, remanded the case to the Supreme Court

of this State "in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein," whereupon an order was entered in Columbia County Clerk's office conformable with the mandate.

Under date of May 3, 1943, defendant, "upon the record on Appeal, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court, the mandate of the United States Supreme Court herein, and all other papers and proceedings herein," noticed a motion at the Albany County Special Term "for judgment dismissing the complaint." Under the same date, upon the affidavit of Mr. Connor, one of plaintiff's attorneys, the mandate of the Supreme Court of the United States, the order and judgment of the Supreme Court of this State entered thereon and "upon the record on appeal and all other papers and proceedings herein," plaintiff noticed a motion for the same Special Term "for summary judgment in favor of the plaintiff and against the defendant, in accordance with the provisions of Rule 113 of the Rules of Civil Practice, and for such other and further relief as to the court may seem just and proper, together [fol. 88] with the costs of this motion." Pursuant to an opinion at Special Term, defendant's motion for a dismissal of the complaint was denied by the order entered June 18, 1943; and plaintiff's motion for summary judgment was granted by the order entered June 16, 1943, on which judgment in accordance therewith was entered, awarding to plaintiff against defendant damages in the amount of $7,186.72, besides interest thereon amounting to $1,824.30, costs of $557.33 and attorneys' fees of $3,000, an aggregate of $12,568.35. For several reasons the judgment thus entered and the order directing its entry cannot stand:

1. As a matter of practice, plaintiff's motion, purporting on its face to be "for summary judgment in favor of the plaintiff and against the defendant, in accordance with the provisions of Rule 113 of the Rules of Civil Practice," was nothing of the kind. To sustain a summary judgment under Rule 113, "there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge. There must be a

failure on the part of the defendant to satisfy the court 'by affidavit or other proof' that there is any basis for his denial or any truth in his defense. The case must take the usual course if less than this appears" (*Curry v. Mackenzie*, 239 N. Y. 267). The order granting summary judgment contains a recital "that the defendant has not shown such facts as to entitle it to further defend this action," but a defendant is not required to make such a showing unless and until plaintiff has first established by affidavit what is *prima facie* a proper case for summary judg-
[fol. 89] ment (*Tidewater Oil Sales Corporation v. Pierce*, 213 App. Div. 796; *Connor v. Commercial Travelers Mutual Accident Association of America*, 247 App. Div. 352). Furthermore, the moving papers on an application under Rule 113 are insufficient if they contain no averment of plaintiff's belief that there is no defense to the action (*Universal Credit Company v. Uggler*, 248 App. Div. 848). Here plaintiff's moving affidavit meets none of the requirements of the Rule, but, obviously with a view to affording a basis for an allowance for attorney's fees under the Federal Act, is confined to a detailed statement of the services performed by plaintiff's attorneys in the prosecution of this action.

2. Moreover, the Supreme Court of the United States manifestly contemplated a trial of this case upon the merits, else it would have directed the entry of a judgment in favor of plaintiff instead of modifying on March 8, 1943, its judgment of the preceding February 8th by adding thereto the provisions that such judgment be "without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought."

3. Passing from consideration of questions of practice to the merits, it is apparent that the Supreme Court thus modified, on March 8, 1943, its judgment of the previous February 8th because it recognized the need for proof of his engagement by defendant in interstate commerce before any plaintiff could recover herein. So the Supreme Court had held in *Overstreet v. North Shore Corporation* (318 U. S. 125), decided February 1, 1943, one week before the
[fol. 90] date of its decision herein granted certiorari and reversing the judgment below. Its ruling in the *Overstreet* case was but a reiteration (p. 132) of earlier pronounce-

ments by the Supreme Court that "the application of the Act depends upon the character of the employees' activities" (*Kirschbaum Co. v. Walling*, 316 U. S. 517, 524; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571), the controlling effect of which the Court of Appeals has very recently recognized (*Stoike v. First National Bank*, 290 N. Y. 195, 201).

4. To be entitled to recover herein, each plaintiff must establish that his employment by defendant was in interstate commerce, or was so closely related to such commerce "as to be in practice and in legal contemplation a part of it," and whether such was the nature of his engagement is determinable by the same tests which control in cases involving classification within or without the Federal Employers' Liability Act. (*Overstreet v. North Shore Corporation, supra; Stoike v. First National Bank, supra.*)

5. It remains to consider whether the terms of the agreed statement of facts, hereinbefore quoted, are broad enough to justify the deduction, expressed in the opinion of the learned Justice at Special Term, "that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing this particular work. * * * Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made." In reaching such conclusion the opinion below stressed paragraphs 2, 3 and 6 of the [fol. 91] agreed statement of facts hereinbefore set forth. But in *McLeod v. Threlkeld* (No. 787, Oct. Term, 1942), decided June 7, 1943, the day before the date of the Special Term's opinion herein, the Supreme Court recognized that an employee's task may be substantially related to repair work upon an instrumentality of interstate commerce, and yet may not be "so closely related to interstate transportation as to be in practice and legal relation a part thereof." By that decision a recovery under the Federal Fair Labor Standards Act was denied to a cook who prepared and served meals for a gang engaged in repairing a railroad's tracks devoted to interstate transportation. It is fair to assume that the *McLeod* case was not brought to the attention of the court below, else its opinion would have referred thereto if, indeed, the decision in that case might not have impelled the court below to a different disposition of plain-

tiff's motion for judgment. The most that can fairly be inferred from the agreed statement of facts is that plaintiffs did work in connection with the construction and repair project on which defendant was engaged, there being nothing in the record to indicate the relationship which the respective tasks of the several plaintiffs bore to the construction and repair work. Thus, plaintiff A would be entitled to recover if his task was to tamp ballast between the ties of the tracks. (*N. Y. C. R. R. Co. v. Winfield*, 244 U. S. 147.) Not so plaintiff B if his task was to supply dry sand to an engine used in the work of construction and repair. (*Erie R. R. Co. v. Szary*, 253 U. S. 86, as overruled [fol. 92] in *Chicago & Eastern Ill. R. R. Co. v. Ind. Comm.*, 288 U. S. 296.) Plaintiff C could recover herein if his job was to flag trains in transit interstate over the tracks while the work of construction and repair was in progress. (*Phila. & Reading Ry. Co. v. DiDonato*, 256 U. S. 327.) But not plaintiff D if he was a cook who prepared and served meals for the repair and construction gang. (*McLeod v. Threlkeld, supra.*) Hence the need, under the doctrine of the *Overstreet* and *McLeod* cases, *supra*, that each plaintiff, as a condition precedent to recovery herein, establish not merely that he was employed by defendant "in doing work under said contract," as stipulated in the agreed statement of facts, but also that his task bore such a close relation to interstate commerce "as to be in practice and in legal contemplation a part of it." On the authority of *Warren-Bradshaw Drilling Co. v. Hall* (317 U. S. 88) the Court of Appeals has observed: "There seems to be no question that the federal statute casts upon the plaintiff the burden of proving that in the performance of work for which he was employed by the defendant he was engaged in interstate commerce or in the production of goods for interstate commerce during the period of asserted overtime employment." (*Stoike v. First National Bank, supra*, p. 200.) From the burden so imposed the several plaintiffs in this case have not been relieved by the agreed statement of facts.

While reversal of the judgment which we are reviewing would relieve defendant of the interest and of the item for costs in which were included those on the former appeal to this court and on the appeal to the Court of Appeals, [fol. 93] it would seem proper to say, for the guidance of the

court on a new trial, that plaintiff's claim for an award of interest on the damages recovered runs counter to the principle which controlled the decision in *Murmann v. N. Y., N. H. & H. R. R. Co.* (258 N. Y. 447). Nor, unless awarded by this court or by the Court of Appeals (and they have not been in this case), can the costs of those appeals be recovered by plaintiff, since the Special Term was without power to award them. (*Green v. Supreme Council of Royal Arcanum*, 91 Misc. 606; 11 Carmody §417; *People ex rel. Keene v. Supervisors*, 83 Hun. 237.) Costs can only be awarded pursuant to statutory provisions (*Osborn v. Cardoza*, 208 N. Y. 131), and Article 85 of the Civil Practice Act will be searched in vain for the grant of power in a trial court to award costs of earlier appeals. Section 1490 of the Civil Practice Act, cited by plaintiff, is inapplicable to the situation with which we are dealing, for the judgment of this court and of the Court of Appeals, awarding costs to defendant, as a successful respondent, have been reversed, while plaintiff, as appellant on those appeals, could have become entitled to costs of his appeals in the State courts only had he secured a reversal there. This is, therefore, a case where neither party is entitled by statute to costs of the appeals taken by plaintiff to the State courts. (*Price v. Price*, 61 Hun. 604, 606; *Matter of Protestant Episcopal Public School*, 86 N. Y. 396.)

The Court below properly denied defendant's motion for a dismissal of the complaint. On the argument before us [fol. 94] the question was raised whether defendant, by making that motion, had conceded the allegations of the complaint, as would undoubtedly be true had the motion been made on the pleadings only, under Rule 112 of the Rules of Civil Practice; but defendant's notice of motion, "for judgment dismissing the complaint," specified not only the pleadings but also "all other papers and proceedings herein" which, under §476 of the Civil Practice Act, included the admissions contained in the agreed statement of facts. Those admissions, however, though insufficiently broad to justify, without proof, a recovery in favor of each plaintiff, are comprehensive enough to withstand a dismissal of the complaint upon motion. Plaintiff and his co-plaintiffs are entitled to make proof in support of the allegation in the complaint that they "were so engaged in interstate commerce in work on the said bridges as employees

of the defendant," taken in connection with the concession in the agreed statement of facts that defendant employed them "in doing work under said contract." That such work brought them within the provisions of the Fair Labor Standards Act is for each plaintiff to prove.

The summary judgment and order entered June 16, 1943, awarding plaintiff a recovery, should be reversed on the law and the facts, with costs to appellant, and plaintiff's motion for summary judgment denied, with $10 costs. The order, entered June 18, 1943, denying appellant's motion to dismiss the complaint, should be affirmed, with $10 costs and disbursements.

[fol. 95] IN THE COURT OF APPEALS OF NEW YORK

[Title omitted]

STIPULATION WAIVING CERTIFICATION—January 20, 1944

It Is Hereby Stipulated, pursuant to §170 of the Civil Practice Act, that the foregoing printed copies of Notice of Appeal to the Appellate Division, the original Record on Appeal herein, the judgments of the Appellate Division, Third Department, Court of Appeals, and United States Supreme Court, the mandate of the United States Supreme Court, plaintiff's notice of motion for summary judgment and moving affidavit, defendant's notice of motion for judgment dismissing complaint, the order denying defendant's motion, the order granting summary judgment, the judgment of Supreme Court, Columbia County, together constituting all papers before the Appellate Division, Third Department, upon which said Appellate Division acted in granting the order and the judgment appealed from, the order of the Appellate Division, the judgment appealed [fol. 96] from, and the notice of appeal to the Court of Appeals, are true and correct copies of the whole respective originals thereof now on file and of record in the office of the Clerk of the County of Columbia, and that certification of such copies by said Clerk is hereby waived and that the foregoing printed copies of the decision of the Appellate Division and the dissenting opinion in the Appellate Division are true and correct copies of the originals thereof

and that the Appellate Division wrote no opinion herein other than said decision and said dissenting opinion.

Dated: January 20, 1944.

Wilson & Connor, Attorneys for Respondent. Whalen, McNamee, Creble & Nichols, Attorneys for Appellant.

[fol. 97] IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—June 14, 1944

CHRIS PEDERSEN, ind. and as agent, &c., for and in behalf of himself, &c., Respondent,

ag'st

J. F. FITZGERALD CONSTRUCTION COMPANY, Appellant

Be It Remembered, That on the 21st day of February in the year of our Lord one thousand nine hundred and forty-four, J. F. Fitzgerald Construction Company, the appellant in this cause, came here unto the Court of Appeals, by Whalen, McNamee, Creble & Nichols, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And [fol. 98] Chris Pedersen, individually, and as agent &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Wilson & Connor, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles E. Nichols of counsel for the appellant, and by Mr. William E. J. Connor of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provid d, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 99] Court of Appeals, Clerk's Office, Albany, June 14, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal) John Ludden, Clerk.

[fol. 100] In Supreme Court of New York

Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and all other Employees of the Defendant Similarly situated, Plaintiff,

against

J. F. Fitzgerald Construction Company, Defendant

At a Special Term of the Supreme Court held in and for the County of Ulster, at the Court House in the City of Kingston, on the 21st day of June, 1944.

Present: Hon. Harry E. Schirick, Justice.
Supreme Court: Columbia County.

Order on Remittitur

The above named defendant having appealed to Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court, Third Department, entered in the above entitled action on November 23, 1943, in the office of the Clerk of the County of Columbia, which judgment affirmed the judgment herein entered in

the office of the Clerk of the County of Columbia on June 16, 1943, and an order entered in the same Clerk's office on the same day granting summary judgment in favor of the plaintiff against defendant, and an order entered in the same Clerk's office on June 18, 1943, denying defendant's motion to dismiss the complaint, and said appeal having been duly argued in said Court of Appeals and after due deliberation, said Court of Appeals having ordered and adjudged that the judgment so appealed from, as aforesaid, be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law;

Now on reading and filing the remittitur from the Court of Appeals herein, and on motion of Wilson & Connor, [fol. 101] Esqs., attorneys for the plaintiff, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Harry E. Schirick, Justice Supreme Court.

Enter in Columbia County.

Sir:

Take notice of an Order of which the within is a copy, duly granted in the within entitled action, on the 21st day of June, 1944, and duly entered in the office of the Clerk of the County of Columbia on the 22nd day of June, 1944.

Dated, Hudson, N. Y., June 22, 1944.

Wilson & Connor, Attorneys for Plaintiff, Office and Post Office Address, 609 Warren Street, Hudson, N. Y.

To Whalen, McNamee, Creble & Nichols, Attorneys for Defendant.

[fol. 102] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of Himself and all other Employees of the Defendant Similarly Situated, Kinderhook, N. Y. Plaintiff,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, 214 Essex Street, Boston, Mass. Defendant

JUDGMENT ON REMITTITUR

A judgment in the above entitled action having been entered in the office of the Clerk of Columbia County on November 23, 1943, upon the order of the Appellate Division of the Supreme Court, Third Department, affirming the judgment herein entered in the office of the Clerk of the County of Columbia on June 16, 1943, and an order entered in the same Clerk's office on the same day granting summary judgment in favor of the plaintiff against defendant, and an order entered in the same Clerk's office on June 18, 1943, denying defendant's motion to dismiss the complaint and the above named defendant having appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and said Court of Appeals having sent to this Court its remittitur, filed herewith, from which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court, by an order entered herein this day having ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the costs of the plaintiff having been duly taxed at the sum of One Hundred Twenty-eight Dollars and Fifty-four Cents ($128.54),

[fol. 103] Now, on motion of Wilson & Connor, Esqs., attorneys for the plaintiff, it is

Adjudged, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that said judgment of the Appellate Division be, and the same hereby is, in all

things, affirmed, and that the plaintiff recover of the defendant the sum of One Hundred Twenty-Eight Dollars and Fifty-four Cents ($128.54), his costs as taxed, and that execution issue accordingly.

Dated: June 19, 1944.

Grant A. Miller, Clerk.

By Harold L. Hall, Deputy.

Sirs:

Take notice of a Judgment of which the within is a copy, duly entered in the office of the Clerk of the County of Columbia on the 22nd day of June, 1944.

Dated, Hudson, N. Y., June 22, 1944.

Wilson & Connor, Attorneys for Plaintiff, Office & Post Office Address, 609 Warren Street, Hudson, New York.

To Whalen, McNamee, Creble & Nichols, Attorneys for Defendant.

[fol. 104] In the Court of Appeals of New York

Chris Pedersen, Individually and as Agent and Representative for and in behalf of Himself and All Other Employees of the Defendant Similarly Situated, Respondent, v. J. F. Fitzgerald Construction Company, Appellant.

Appeal from a judgment entered November 23, 1943, upon an order of the Appellate Division of the Supreme Court in the third judicial department which affirmed an order of Special Term (Foster, J.) granting a motion by plaintiffs for summary judgment and denying a motion by defendant for dismissal of the complaint.

Charles E. Nichols and Henry E. Foley of Boston, Massachusetts, for appellant.

William E. J. Connor for respondent.

Opinion—June 14, 1944.

Loughran, J.:

This action was brought under section 16-b of the Fair Labor Standards Act by employees against their employer to recover overtime compensation plus an equivalent amount as liquidated damages. The question was whether at the time in issue the plaintiffs were "en-

gaged in commerce" in the sense of that phrase as used in sections 6 and 7 of the Act. (See *Stoike* v. *First National Bank*, 290 N. Y. 195.)

Special Term dismissed the complaint (173 Misc. 180) and its judgment was affirmed by the Appellate Division (262 App. Div. 665) and by this court (288 N. Y. 687). The Supreme Court of the United States reversed and by its mandate sent the case back to the Supreme Court of New York for further appropriate proceedings, but "without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (318 U. S. 740, 742.) After that ultimate decree had in due course been made the judgment of the Supreme Court of New York, the plaintiffs moved [fol. 105] for a summary recovery under rule 113. Special Term granted that motion and denied a cross motion by the defendant for dismissal of the complaint. The Appellate Division affirmed, one Justice dissenting, and the controversy is now before us a second time on an appeal by the defendant from that determination.

The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under a contract through which the defendant undertook with a railroad company to reconstruct two bridges that were instrumentalities of interstate commerce. (262 App. Div. 665, 667.). These conceded facts are now said by the defendant to be insufficient as a basis for disposition of the issue as to whether the plaintiffs were "engaged in commerce" at the time they were so employed.

We concur with the courts below in their rejection of that contention. The agreed statement of facts on the face of it was a case within the statute. (*McLeod* v. *Threlkeld*, 319 U. S. 491, 494.) No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable.

The remaining questions have to do with costs and interest that were allowed to the plaintiffs.

The award to them of costs in all courts was not unauthorized. (Civ. Prac. Act, § 1470, subd. 11; *Murtha* v. *Curley*, 92 N. Y. 359, 361-362.) *Stevens* v. *Central Savings*

Bank (168 N. Y. 560) is not authority for a different view. In the *Stevens* case this court was reversed by the Supreme Court of the United States on one point, but the substance of our judgment in favor of the plaintiffs was left undisturbed and in that situation the defendants were not to be treated as parties who had ultimately prevailed.

[fol. 106] As we read the Federal cases, the liability for liquidated damages under the Fair Labor Standards Act is contractual in character. (*Overnight Motor Co.* v. *Missel*, 316 N. Y. 572, 583; *Northwestern Yeast Co.* v. *Broutin*, 133 F. 2d. 628; see, too, *Cox* v. *Lykes Brothers*, 237 N. Y. 376; *Wright* v. *State of New York*, 223 N. Y. 44; *Calvin* v. *Huntley*, 178 Mass. 29.) In that view, the plaintiffs were entitled to interest on the whole of their recovery including the liquidated damages. (Civ. Prac. Act, § 480; see *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 498.)

The judgment should be affirmed, with costs.

Lehman, Ch. J. (Dissenting in part). I dissent only from so much of the decision as holds that the plaintiff is entitled to interest on the "stipulated damages," which under the statute, must be paid by any employer who violates the provisions of sections 6 and 7 of the Fair Labor Standards Act. The liability for such payment, though not a penalty, is imposed in the statute as liquidated damages for the "retention of a workman's pay." They are so denominated in the statute and they are intended to provide "compensation" for injury suffered by a wrongful act which "may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (*Overnight Motor Transportation Co., Inc., v. Missel*, 316 U. S. 572.) Section 480 of the Civil Practice Act, does not, I think, apply in such case. The question has not heretofore been raised in any case where this court has affirmed a judgment which included interest on stipulated damages.

Rippey, Lewis and Desmond, JJ., concur with Loughran, J.; Lehman, Ch. J., dissents in part in separate opinion in which Conway and Thacher, JJ., concur.

Judgment affirmed.

[fol. 107] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1944

A petition for rehearing having been filed in this case by counsel for petitioner to remove the limitation imposed by order of November 6, 1944, granting the petition for certiorari herein,

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted, and the order of November 6, 1944, is vacated.

It is further ordered that the petition for certiorari herein be, and the same is hereby, granted.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF NEW YORK

HENRY E. FOLEY,
Counsel for Petitioner.

Dated: September 11, 1944

GEORGE H. OEAN CO., PRINTERS, BOSTON

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. —

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

Now comes J. F. Fitzgerald Construction Company, your petitioner, by Henry E. Foley, its counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Supreme Court of the State of New York require said Court to certify and remove to this Court for its review and determination, a certain cause lately pending in said Court, wherein your petitioner was defendant-appellant and Chris Pedersen, individually and as agent and representative, was plaintiff-respondent, and to that end your petitioner aforesaid now tenders herewith its petition with a certified copy of the record in said cause.

HENRY E. FOLEY,
Counsel for Petitioner

Dated: September 11, 1944

SUBJECT INDEX

	Page
Statement of the Matters Involved	1
Jurisdiction	6
Prior Opinions in These Proceedings	6
Statute Involved	7
Questions Presented	7
Reasons in Support of Petition	7
Conclusion	20

TABLE OF CASES CITED

Bennett v. *Atchison, Topeka & Santa Fe Railroad Co.*, 187 Iowa 897	19
Berry et al v. 34 Irving Place Corporation, — F. Supp.	19
Campbell v. *Zavelo*, 243 Ala. 361	19
Chicago & Eastern Illinois Railroad Co. v. *Industrial Commission of Illinois et al*, 284 U. S. 296	10
Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. *Busby*, 41 F. (2d) 617	19
Chicago & Northwestern Railway Co. v. *Bolle*, 284 U. S. 74	10
Greenberg v. *Arsenal Building Corporation et al*, F. (2d)	19
McLeod v. *Threlkeld*, 319 U. S. 491	9
Mobile & Ohio Railroad Co. v. *Williams*, 219 Ala. 238	9
Murmann v. *The New York, New Haven & Hartford Railroad Co.*, 258 N. Y. 447	19
Overnight Motor Transportation Co. v. *Missel*, 316 U. S. 572	18
Overstreet v. *North Shore Corporation*, 318 U. S. 125	3
Warren-Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88	8, 15

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. —

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN; *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF NEW YORK

Now comes your petitioner, J. F. Fitzgerald Construction Company, and respectfully represents to this Honorable Court as follows:

STATEMENT OF THE MATTERS INVOLVED

1. The judgment, review of which is sought in this proceeding, was entered by the Supreme Court of the State of New York, upon remittitur from the Court of Appeals of said State, in an action commenced in said Supreme Court by the plaintiff,[1] Pedersen, individually and on behalf of

[1] The terms — plaintiff — and — plaintiffs — as hereinafter used mean the plaintiff, Pedersen, and those persons on whose behalf he is suing.

certain other former employees of your petitioner, for the recovery of overtime wages and liquidated damages alleged to be due by virtue of the provisions of the Fair Labor Standards Act of 1938 (29 U. S. Code 201 et seq.).

2. The action was tried, pursuant to stipulation, on an agreed statement of facts in lieu of proof, (R. 9) and findings were made by the Trial Judge, in accordance with said agreed statement, of which the following are pertinent to this proceeding:

"That The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right-of-way in the Town of Chatham, Columbia County, New York."

"That in September 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damages by a flood."

"That thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid."

"*That defendant employed plaintiffs,* together with other individuals, *as its employees in doing work under said contract* and paid them at the rates per hour, as shown on Schedule 'A' annexed to said stipulation of December 1, 1939."

"That after October 24, 1938, until the completion of said work by the defendant under said contract, *each plaintiff worked for the defendant* the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed to said stipulation of December 1, 1939." (Italics supplied) (R. 9-10).

3. No finding was made, and nothing in the record would warrant a finding, as to the particular work done for the defendant by any plaintiff at any time.

4. After trial, the complaint was dismissed by the Trial Court (R. 18) and the dismissal was sustained first by the Appellate Division of the Supreme Court (R. 18) and thereafter by the Court of Appeals (R. 27), the ground of dismissal being that, as the petitioner was engaged in local construction work not constituting interstate commerce, none of the plaintiffs could have been engaged in commerce. (R. 14, 21).

5. The plaintiff thereupon filed in this Court a petition for certiorari. On February 1, 1943, while the plaintiff's petition for certiorari was pending, this Court rendered its decision in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125. That decision established that the ground underlying the decisions of the New York courts herein (namely that the nature of the employer's business, rather than the nature of the employees' activity, was controlling) was unsound. Accordingly, this Court, without hearing argument, entered an order directing that the judgment of the Supreme Court of the State of New York "be and the same hereby is reversed with costs on the authority of *Overstreet* v. *North Shore Corporation*, No. 284, decided February 1, 1943" and that "this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court" (318 U. S. 740).

6. Upon notice of said order of this Court, your petitioner, recognizing that under the Fair Labor Standards Act of 1938, as interpreted in the *Overstreet* decision, no plaintiff was entitled to recover on the record before this Court but fearing that the order of reversal of this Court

would be misconstrued as indicating that the plaintiffs were considered to be entitled to recovery on said record, filed in this Court its petition for rehearing wherein your petitioner pointed out:

1. That under the *Overstreet* decision, recovery depends upon a showing of the particular work which a plaintiff has done and that such work was so closely related to commerce "as to be in practice and in legal contemplation a part of it"; and

2. That on the record herein no showing was made of the particular work done by any plaintiff and that, therefore, there was no showing that the activity of any plaintiff was at any time so closely related to commerce "as to be in practice and in legal contemplation a part of it".

7. Upon consideration of your petitioner's application for rehearing, this Court amended its order by adding, after the direction that the cause be remanded for further proceedings not inconsistent with the opinion of this Court, the following caveat:

"and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (R. 30) (318 U. S. 742).

This Court thus not only negatived any possible inference that by reversal it had concluded that the plaintiffs had established their case but also affirmatively indicated that such a determination was a prerequisite to the entry of judgment for any plaintiff.

8. Notwithstanding the decision in the *Overstreet* case and the mandate of this Court, the plaintiff moved in the Supreme Court of the State of New York for summary judgment upon the original record in these proceedings, being the record which this Court had previously considered. The Supreme Court granted the plaintiff's motion for

summary judgment and included interest on the double damages allowed (R. 42). In its opinion the Supreme Court adopted the following test of coverage under the Act:

> "In a case such as this the test must necessarily be whether the activities of complaining employees were *substantially related to the repair* of interstate transportation facilities." (Italics supplied) (R. 45)

The Court concluded that the record, which was the record formerly before this Court, showed that the activities of the plaintiffs were *substantially related* to the repair of interstate transportation facilities (R. 46). The Supreme Court was sustained in its action by the Appellate Division, Third Department, (R. 51). The Appellate Division sustained the Supreme Court decision without a majority opinion (R. 51). Mr. Justice Schenck dissenting submitted an opinion in which he rejected the test of coverage advanced by the Court below as not consistent with the decisions of this Court, pointing out that this Court had

> "recognized that an employee's task may be substantially related to repair work upon an instrumentality of interstate commerce, and yet may not be 'so closely related to interstate transportation as to be in practice and legal relation a part thereof.' " (R. 55).

The Court of Appeals thereafter sustained the decisions below. Apparently the test of coverage adopted by the State Supreme Court was accepted, for the Court of Appeals stated in its opinion:

> "The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under contract through which the defendant undertook with a railroad company to reconstruct two bridges that were instrumentalities of interstate commerce." (262 App. Div. 665, 667). These conceded facts are now said by the de-

fendant to be insufficient as a basis for disposition of the issue as to whether the plaintiffs were 'engaged in commerce' at the time they were so employed.

"We concur with the courts below in their rejection of that contention. The agreed statement of facts *on the face of it* was a case within the statute." (Italics supplied) (R. 64)

9. On remittitur from the Court of Appeals the order and judgment of that Court were made the order and judgment of the Supreme Court of the State of New York.

10. Your petitioner seeks review of said judgment.

JURISDICTION

11. The jurisdiction of this Court to issue the writ requested herein is based upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, Title 28, § 344 (b)).

PRIOR OPINIONS IN THESE PROCEEDINGS

12. The opinion of the Court of Appeals of the State of New York, handed down June 14, 1944 (R. 63) is reported at 293 N. Y. 126. The decision (without majority opinion) of the Appellate Division, Third Department, of the Supreme Court of the State of New York, handed down November 18, 1943, (R. 51) is reported at 266 App. Div. 1032. The opinion of the Supreme Court of the State of New York, handed down May 21, 1943, (R. 43) is unreported. The per curiam opinions of this Court, handed down February 8, 1943 and March 8, 1943, respectively, are reported at 318 U. S. 740 and 318 U. S. 742, respectively. The prior decision (without opinion) of the Court of Appeals of the State of New York, handed down June 18, 1942, is reported at 288 N. Y. 687. The prior decision of the Appellate Divi-

sion, Third Department, of the Supreme Court of the State of New York, handed down November 15, 1941, is reported at 262 App. Div. 665; and the prior opinion of the Supreme Court of the State of New York, handed down March 2, 1940, is reported at 173 N. Y. Misc. 188.

STATUTE INVOLVED

13. The statute involved is the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, S. 201 et seq.), the pertinent provisions of which are set forth in an appendix hereto.

QUESTIONS PRESENTED

14. Your petitioner seeks consideration and review of the following questions:

(1) Whether the entry of judgment for the plaintiffs by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, except merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs and others were employed by your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

REASONS IN SUPPORT OF PETITION

15. The Court of Appeals of the State of New York has misinterpreted the mandate of this Court and has decided a federal question of substance (by holding that an employee is entitled to recovery under Sec. 16 (b) of the Fair Labor

Standards Act of 1938 on a mere showing that his employer entered into a contract to repair instrumentalities of commerce and that the employee did work under the contract, without any showing as to the nature of the work at any time done by such employee) not only in conflict with the decisions of this Court but in direct conflict with the mandate of this Court entered at a prior stage of this proceeding. And such decision, if not corrected, will create uncertainty with respect to the coverage of the Fair Labor Standards Act in that large field of employment consisting of employment in work related to the repair and reconstruction of instrumentalities of commerce, including not only employment in work related to the repair and reconstruction of railroad bridges and rights of way but also employment in work related to the repair and reconstruction of public highways, streets, and bridges, air fields, telephone transmission lines, gas mains, water mains and electric transmission lines, to mention only some of the employment fields affected.

(1) The Court of Appeals has decided a federal question of substance in conflict with the decisions of this Court and under circumstances calling for review by this Court.

(a) Under the decisions of this Court, no plaintiff herein is entitled to judgment in the absence of a showing that his individual activity constituted commerce or was so closely related to commerce "as to be in practice and in legal contemplation a part of it." That an employee seeking judgment under the Fair Labor Standards Act of 1938 has the burden of proving that he comes within the coverage of the Act was established by this Court in *Warren-Bradshaw Drilling Company* v. *Hall*, 317 U. S. 88, 90 (1942), but this Court did not, until the *Overstreet* decision, interpret the words "engaged in commerce" as used in the Act. The

Overstreet decision and the subsequent decision of this Court in *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), however, unequivocally established that whether an employee performing work related to the repair of an instrumentality of commerce is "engaged in commerce" within the meaning of those words in the Act is determined by the character of the particular activity of the individual employee; that the test of engagement in commerce under the Act is whether the activity of the individual employee, if not in fact an activity constituting "commerce", is at least so closely related to commerce "as to be in practice and in legal contemplation a part of it"; and that, in applying such test, the same standard should be applied as was applicable in determining employment in commerce under the Federal Employers' Liability Act, since "Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

(b) The Court of Appeals of the State of New York has affirmed the entry of judgment for the plaintiffs on a record which is wholly devoid of evidence as to the particular activity of any employee or as to closeness of the relation of such activity to commerce. The record establishes only that your petitioner entered into a contract with an interstate carrier for the construction of new abutments for two bridges and repair work upon sub-structures of two other bridges owned by the carrier; that the plaintiffs (and others) were employed by your petitioner in "doing work under the contract" and that the plaintiffs in fact "worked" for your petitioner. (R. 9-10). The particular work done by any plaintiff at any time nowhere appears in the record. Nothing in the record shows more than that the plaintiffs' work was in relation to a repair project and this was held to be an insufficient showing in the *McLeod* case. Nothing in the record affords a basis for applying the Federal Em-

ployers' Liability Act test of coverage held applicable to cases under the Fair Labor Standards Act in the *Overstreet* and *McLeod* decisions. The record, for example, provides no basis for a determination as to whether any individual workman was performing work which, however necessary, was only incidental to, or only preliminary to, or only expedited, the work being performed by other employees, as were the workmen in the cases which denied coverage under the Federal Employers' Liability Act and are cited with approval in the *Overstreet* and *McLeod* cases (see, for example *Chicago and Northwestern Railway Company* v. *Bolle*, 284 U. S. 74 (1931) and *Chicago and Eastern Illinois Railroad Company* v. *Industrial Commission of Illinois et al*, 284 U. S. 296 (1932)). The record affords no answer as to whether any particular plaintiff was at any time engaged in actual repair work on an instrumentality of commerce (as the employees in the *Overstreet* case were alleged to be) or was instead engaged, for example, only in setting up and maintaining stationary derricks, platforms and pile drivers, in oiling or cleaning machinery, in trucking or unloading supplies to be used when needed on the project, in the repair or sharpening of tools, or in any one of the many other preliminary or incidental occupations which, in the decisions in and following the *Bolle* and *Industrial Commission* cases (*supra*), have been held to be employments which are neither commerce nor so closely related thereto "as to be in practice and in legal contemplation a part of it." The record fails even to exclude any plaintiff from that substantial group of employees on any repair or construction project whose duties have absolutely no relation to the progress of the actual construction work but are concerned entirely with the salvage and disposition, solely for the contractor's benefit, of lumber and other materials which cannot further be used on the particular project. The

record gives not the slightest hint of the nature or character of any of the plaintiffs' particular activities.

(c) By affirming a judgment for the plaintiffs on a record which fails to show the particular activities of any plaintiff and which thus fails to enable a determination of the closeness of the relation of the activities of any plaintiff to commerce, the Court of Appeals has decided a federal question of substance in conflict with the decisions of this Court. The Court of Appeals has concluded, notwithstanding the holdings of this Court in the *Overstreet* and *McLeod* decisions, that the plaintiffs have established a case under the Act by showing merely that they performed work in connection with a repair project upon which the defendant was engaged and without any showing as to whether any plaintiff was, in any week for which overtime compensation is sought, actually engaged in repair work as distinguished from performing those many preliminary, incidental and subsequent operations which are required to be performed on any major repair job and which have been uniformly held not to constitute engagement in commerce under the Federal Employers' Liability Act cases. The Court of Appeals said:

> "The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under a contract through which the defendant undertook with a railroad company to reconstruct two bridges that were instrumentalities of interstate commerce." (R. 64).
>
> "The agreed statements of facts *on the face of it* was a case within the statute." (Italics supplied) (R. 64)

The error of the Court apparently lies in its having accepted the test of coverage advanced by the Trial Judge who had held that:

". . . the test must necessarily be whether the activities of complaining employees were substantially related to the repair of interstate transportation facilities." (R. 45).

The error in such a test was indicated by Mr. Justice Schenck in his dissenting opinion in the Appellate Division when he pointed out that:

". . . an employee's task may be substantially related to repair work upon an instrumentality of interstate commerce, and yet may not be 'so closely related to interstate transportation as to be in practice and legal relation a part thereof.'" (R. 55)

And when he gave the following illustrations:

"Thus, plaintiff A would be entitled to recover if his task was to tamp ballast between the ties of the tracks. (*N. Y. C. & R. R. Co.* v. *Winfield*, 244 U. S. 147). Not so plaintiff B if his task was to supply dry sand to an engine used in the work of construction and repair. (*Erie R. R. Co.* v. *Szary*, 253 U. S. 86, as overruled in *Chicago & Eastern Ill. R. R. Co.* v. *Ind. Comm.*, 288 U. S. 296). Plaintiff C could recover herein if his job was to flag trains in transit interstate over the tracks while the work of construction and repair was in progress. (*Phila. & Reading Ry. Co.* v. *DiDonato*, 256 U. S. 327). But not plaintiff D if he was a cook who prepared and served meals for the repair and construction gang. (*McLeod* v. *Threlkeld, supra*). (R. 56).

But whatever the reason for the error of the Court of Appeals, that Court plainly erred. It is obvious that on the facts of record no plaintiff could conceivably be thought to have established employment in commerce sufficient to constitute compliance with the test of the Federal Employers' Liability Act cases, held by the *Overstreet* and *McLeod* decisions to be controlling under the Fair Labor Standards Act of 1938. Nothing in the record enables a determination that any plaintiff was engaged at any time in

commerce or in activity "so closely related to commerce as to be in practice and in legal contemplation a part of it."

(d) While this Court has a vital interest in the proper decision by State courts of Federal questions of substance, there are particularly strong considerations in this proceeding which call for review. The crucial issue herein concerns the test of coverage in the case of employees, of whom there are thousands, engaged in work related to the repair and reconstruction of instrumentalities of commerce. *The instant case is a leading case in the field.* If a writ herein is denied, a heavy cloud of uncertainty will fall upon the question of coverage. Enforcement agencies will inevitably insist (and some, at least, are now insisting) that employees engaged in repair projects are covered by the Act whether their work be itself repair work or one, two or three stages removed. The test laid down in the *Overstreet* and *McLeod* cases will inevitably be treated as modified, if review herein is denied, with the unfortunate consequence that employers will be uncertain of their obligations and employees of their rights. In so important a field, the law should not be permitted to become confused.

(2) The Court of Appeals has decided the proceeding below in conflict with the mandate of this Court and the disregard of said mandate should be reviewed by this Court.

(a) Even if the original order herein had not been amended by this Court it would have precluded the entry of judgment for any plaintiff *on the present record.* The order, as originally issued, required that the cause be remanded for further proceedings consistent with the opinion of this Court. The New York courts, having decided the case on the ground that the nature of the employer's activity was controlling, were held to have erred and judgment was reversed. The requirement of the order was that the New

York court decide the case in accordance with the law laid down in the *Overstreet* case. That case held, as has hereinbefore been pointed out, that the nature of the employees' activity, and not that of the employer, was controlling, and held applicable the Federal Employers' Liability Act test of engagement in commerce. As the nature of the employees' activity does not appear in the record and as the test held by this Court to be governing could not on the record be shown to have been satisfied, a decision on the record for any plaintiff necessarily conflicted with the mandate. No plaintiff has sustained the burden of showing that his activities constituted commerce or were so closely related to commerce "as to be in practice and in legal contemplation a part of it" as required by the *Overstreet* decision and the order of this Court.

(b) While the order of this Court in its original form (requiring, as it did, subsequent proceedings in conformity with the law laid down in the *Overstreet* decision) precluded a judgment for any plaintiff on the present record, the amendment clarifying the mandate makes even more clear the requirement that no plaintiff be awarded judgment on that record. As hereinbefore pointed out, when the original order was issued, your petitioners (recognizing that on the record then before this Court no plaintiff was entitled to recovery under the law laid down by this Court, but fearing that the order of reversal might lead the New York courts to believe that this Court had concluded that the plaintiffs had established their case) filed herein a petition for rehearing, pointing out that on the record before this Court the plaintiffs had not established their position under the interpretation of the Act held by this Court to be proper. This Court thereupon amended its mandate by the addition, after the direction that further proceedings be had not inconsistent with the opinion of this court, of the words:

"and without prejudice to a determination of the nature of the employment of *any* members of the class on whose behalf this suit has been brought." (Italics supplied) (R. 30).

By the amended mandate this Court (1) made clear that to recover the plaintiffs must show [2] the nature of their employment in order that the tests of the *Overstreet* case might be satisfied and (2) negatived any possible inference that this Court had considered that the plaintiffs had satisfied the *Overstreet* test and were entitled to judgment. The "determination of the nature of the employment of *any* members of the class on whose behalf this suit has been brought", required by the amended mandate, could not be made on the record then before this Court. The record then before this Court (which is the same in this regard as the present record, no further showing of the activity of any of the plaintiffs having been made) showed nothing which would enable a determination that any plaintiff was engaged in commerce or in activity "so closely related to commerce as to be in practice and in legal contemplation a part of it." Such determination could only be made on a reopened or new record showing the particular activity of the individual plaintiffs. But the plaintiffs did not have the record reopened or a new record established.[3] They sought judgment on a record upon which the determination required by this Court's mandate could not be made. The Court of Appeals

[2] Clearly this Court did not intend to shift the burden of proof to your petitioner. Such a construction of the mandate would be in conflict with the well-established law of this Court that under the Act employees have the burden of establishing coverage (*Warren-Bradshaw Drilling Company* v. *Hall* (*supra*).

[3] See footnote (2). There is some question whether under the applicable law plaintiffs were entitled to reopen, but that issue is not here involved. The plaintiffs moved for summary judgment on the original record.

in affirming judgment for the plaintiffs on such a record ignored the caveat of this Court that a judgment for any plaintiff required a showing of the nature of that plaintiff's activity so that a determination might properly be made that he had satisfied the test of the *Overstreet* case. As was stated by Mr. Justice Schenck in his dissenting opinion in the Appellate Division:

> ". . . it is apparent that the Supreme Court thus modified, on March 8, 1943, its judgment of the previous February 8th, because it recognized the need for proof of his engagement by defendant in interstate commerce before any plaintiff could recover herein." (R. 54)

Such proof was not forthcoming.

(c) Not only does this case present a Federal question of substance which should be decided by this Court but it presents, in addition, a question as to whether the mandate of this Court has been complied with. This Court, as any Court having once taken jurisdiction, has a strong interest in securing compliance with its orders. As this Court's mandate has not been complied with, this Court should review the action of the New York courts for reasons additional to those arising from the important and far reaching Federal question involved. This Court having entered an order which deprived your petitioner of the relief originally granted it (though it is conceded that such relief was granted on erroneous grounds) should, it is submitted, protect your petitioner from an erroneous disregard of the mandate of this Court depriving your petitioner of the relief to which it is entitled.

16. The Court of Appeals of the State of New York has also decided a further federal question of substance, (to wit, whether interest may be added to the statutory double damages in awarding judgment to employees under section 16 (b) of the Fair Labor Standards Act of 1938). This

question is novel and has not yet been reviewed by this Court.

(1) The Court of Appeals, in affirming an award to the plaintiffs of interest on statutory double damages, has erroneously decided a federal question of substance.

(a) The Fair Labor Standards Act of 1938 does not authorize the inclusion of interest in a judgment rendered thereunder; rather, properly construed, it precludes such an award. The Act contains no affirmative provision for the inclusion of interest in an award thereunder, and interest is by direct implication excluded. The Act provides with clear particularity the measure of recovery to which a successful plaintiff is entitled in a proceeding instituted under section 16 (b) of the Act. Thus, the Act provides that successful plaintiffs shall recover "their unpaid minimum wages, or their unpaid overtime compensation, as the case may be," and "an additional equal amount as liquidated damages." In addition, provision is made for the allowance of a "reasonable attorney's fee to be paid by the defendant, and costs of the action." In view of the circumstance that detailed provision is made for the elements of recoverable damage including provision for attorney's fees and costs, it is apparent that the failure to include interest is intentional. The failure to provide for interest is for an obvious reason. Interest is the legal remedy for delayed payment. It is the damages a defendant pays for delay. But the Act here has provided for double damages as the remedy for all injury, including the injury of delay. As this Court pointed out, in *Overnight Motor Transportation Company* v. *Missel*, 316 U. S. 572 (1942) the statutory provision for liquidated damages recognizes that,

> "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

It is obvious that Congress did not intend to award double damages to take care of the consequences of delayed payment and then to allow the award of interest, itself the price normally paid for delay, on those double damages. Two remedies for delayed payment are clearly not intended.

(b) In view of the fact that Congress did not include interest in the measure of damages recoverable under the Act the Court of Appeals erred in affirming an award of interest on the statutory double damages in reliance upon a state statute. The Court of Appeals relied on Section 480 of the New York Civil Practice Act as authorizing the inclusion of interest (R. 65). But interest may not be awarded pursuant to a state statute in an action under the Fair Labor Standards Act. Congress has, by its enactment of the Act, as between itself and the State legislature, completely occupied the field in the case of employees engaged in commerce and in the production of goods for commerce. Congress has prescribed the standards to be observed and, in detail, the remedies for failure to conform to the required standards. The states may no more add to, than they may detract from, those remedies. In this respect also the Act is analogous to the Federal Employers' Liability Act. In cases under the latter Act it has been consistently held that interest, authorized by state statute, may not be included in a judgment, under the federal act. Thus, in *Murmann* v. *The New York, New Haven and Hartford Railroad Company*, 258 N. Y. 447 (1942), it was held that the addition of interest, pursuant to a state statute, to a verdict returned under the Federal Employers' Liability Act was improper. In that case the Court pointed out, at page 450:

> "The federal legislation covers the whole field, and the power of the states is not broad enough to change the assessment of the damages as determined by the verdict."

The same principle has been consistently recognized in other decisions under the Federal Employers' Liability Act, both prior and subsequent to the *Hurmann* decision. (See, for example, *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Busby*, 41 F. (2d) 617 (C.C.A. 9, 1930) and *Mobile & Ohio Railroad Co.* v. *Williams*, 219 Ala. 238 (1939); *Bennett* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 187 Iowa 897 (1919)). The principle is of equal application under the present Act. Mr. Justice Schenck so noted in his dissenting opinion in the Appellate Division (R. 57). Mr. Justice Rifkind so held, in his decision in *Berry et al* v. *34 Irving Place Corporation*, —— F. Supp. —— (decided June 16, 1944) (D. C. S. D. N. Y.) and the Supreme Court of Alabama so recognized, in *Campbell* v. *Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29 (1942). Although the Circuit Court of Appeals for the Second Circuit, relying on the decision of the Court of Appeals of the State of New York in the instant case, has, since the decision in the *Berry* case, determined [4] that interest may be added to the plaintiff's recovery under Section 480 of the New York Civil Practice Act, neither the Circuit Court of Appeals nor any other Court has attempted to distinguish the uniform line of decisions, hereinbefore referred to, which hold that state statutes, awarding interest prior to judgment, cannot be availed of to add to the statutory recovery prescribed by Congress in a field which Congress has fully occupied. Such a distinction, it is submitted, cannot properly be made.

(c) There is a strong public interest in the review by this Court of the determination of the Court of Appeals of the State of New York that interest on the statutory double

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[4] In *Greenberg* v. *Arsenal Building Corporation et al.*—F (2d)—(decided July 18, 1944). A petition for writ of certiorari in the *Greenberg* proceeding is now pending in this Court.

damages may be included in a judgment under the Act. An important and novel federal question of substance has been decided by a State Court and erroneously decided. To the severe remedy of double damages provided in the Act, the New York courts have added an additional severe consequence not provided for in the Act and precluded by the Act. The decision of the Court of Appeals herein has already been adopted by one Court in the *Greenberg* case, (*supra*). If the decision of the New York court be not reviewed by this Court, other courts are likely to follow the New York precedent. A review is required to assure a proper decision.

CONCLUSION

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the Supreme Court of the State of New York, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

HENRY E. FOLEY,
Counsel for Petitioner.

Dated: September 11, 1944

APPENDIX.

Fair Labor Standards Act of 1938 (29 U. S. Code, Sections 203, *et seq.*).

Sec. 203 (b) "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" (Sec. 3 [b]).

Sec. 207 (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Sec. 7 [a]).

Sec. 216 (b) "Any employer who violates the provisions of Section 206 or Section 207 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" (Sec. 16 [b]).

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CHARLES ELMORE CROPLEY

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

BRIEF ON BEHALF OF PETITIONER, J. F. FITZGERALD CONSTRUCTION COMPANY

HENRY E. FOLEY,
Counsel for Petitioner

Dated: January 6, 1945

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SUBJECT INDEX

	Page
Table of Authorities	i
Prior Opinions	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Summary of Argument	8
Argument	11
Appendix	32

TABLE OF AUTHORITIES

Cases:

A. B. Kirschbaum Co. v. *Walling*, 316 U. S. 517 (1942) 8, 12

Bennett v. *Atchison, Topeka & Santa Fe Ry. Co.*, 187 Iowa 897 (1919) 30

Berry et al v. *34 Irving Place Corporation*, 8 C. C. H. Labor Cases ¶ 62, 265 (S. D. N. Y., June 16, 1944) 10, 30

Campbell v. *Zavelo*, 243 Ala. 361 (1942) 10, 27, 30

Chicago & Eastern Illinois Railroad Co. v. *Industrial Commission of Illinois*, 284 U. S. 296 (1932) 16, 20

Chicago & North Western Railway Company v. *Bolle*, 284 U. S. 74 (1931) 16, 20

Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. *Busby*, 41 Fed. (2d) 617 (C. C. A. 9, 1930) 10, 29

Jax Beer Company v. *Redfern*, 124 Fed. (2d) 172 (C. C. A. 5, 1941) 24

Jones v. *Springfield Missouri Packing Co.*, 45 F. Supp. 997 (S. D. Mo., 1942) 9, 24

Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941) 30

Louisiana & Arkansas Railroad Company v. *Pratt*, 142 Fed. (2d) 847 (C. C. A. 5, 1944) 10, 29

PAGE

McLeod v. *Threlkeld*, 319 U. S. 491 (1943) 8, 9, 12, 13, 15, 16, 18, 19, 20

Mobile & Ohio R. R. Co. v. *Williams*, 219 Ala. 238 (1929) 29

Murmann v. *New York, New Haven and Hartford Railroad Company*, 258 N. Y. 447 (1932) 10, 28

New York, New Haven and Hartford Railroad Company v. *Bezue*, 284 U. S. 415 (1932) 16

Overnight Motor Transportation Company v. *Missel*, 316 U. S. 572 (1942) 27

Overstreet v. *North Shore Corporation*, 318 U. S. 125 (1943) 8, 9, 12, 15, 16, 19, 20

Pedersen v. *Delaware, Lackawanna & Western Railroad Company*, 229 U. S. 146 (1913) 13

Schwarz v. *Witwer Grocer Co.*, 49 F. Supp. 1003 (N. D. Iowa, 1943), aff'd 141 Fed. (2d) 341 (C. C. A. 8, 1941) 9, 24

Shanks v. *Delaware, Lackawanna & Western Railroad Company*, 239 U. S. 556 (1916) 16, 20

Super-Cold Southwest Co. v. *McBride*, 124 Fed. (2d) 90 (C. C. A. 5, 1941) 9, 24

Warren-Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88 (1942) .. 9, 23

Treatise:

Wigmore on Evidence (3rd ed.) § 2489 25

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

BRIEF ON BEHALF OF PETITIONER, J. F. FITZGERALD CONSTRUCTION COMPANY

PRIOR OPINIONS

The opinion of the Court of Appeals of the State of New York of June 14, 1944, (R. 63-65) is reported in 293 N. Y. 126.[1] The decision (without majority opinion) of the Appellate Division, Third Department, of the Supreme Court of the State of New York, of November 18, 1943, (R. 51-58) is reported in 266 App. Div. 1032. The opinion of the

[1] The order of said Court amending its remittitur is set forth in the Appendix hereto and a certified copy is on file with the Clerk of this Court.

Supreme Court of the State of New York of May 21, 1943, (R. 42-47) is unreported. The per curiam opinions of this Court, of February 8, 1943, and March 8, 1943, respectively, are reported in 318 U. S. 740 and 318 U. S. 742, respectively.

The prior decision (without opinion) of said Court of Appeals (R. 27) is reported at 288 N. Y. 687; the prior opinion of said Appellate Division (R. 20-22) is reported at 262 App. Div. 665; and the prior opinion of said Supreme Court (R. 12-15) is reported at 173 N. Y. Misc. 188.

JURISDICTION

The statute involved is the Fair Labor Standards Act of 1938 (29 U. S. Code sec. 201 et seq.), the pertinent provisions of which are set forth in an appendix hereto.

The jurisdiction of this Court herein is based upon section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. Code sec. 344 (b)). This Court, on December 18, 1944, granted your petitioner's petition herein for certiorari. (R. 66)

QUESTIONS PRESENTED

Your petitioner seeks consideration and review of the following questions:

(1) Whether the entry of judgment for the plaintiffs[2] by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, and which shows merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs, together with others, were employed by

[2] The terms "plaintiff" and "plaintiffs" as here and hereinafter used mean the plaintiff, Pedersen, and those persons on whose behalf he is suing, and who are the respondents in this proceeding.

your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

STATEMENT OF THE CASE

The judgment for the plaintiffs, review of which is sought in this proceeding, was entered by the Supreme Court of the State of New York upon remittitur from the Court of Appeals of said State, in an action for the recovery of overtime compensation and liquidated damages alleged to be due by virtue of the provisions of the Fair Labor Standards Act of 1938 (29 U. S. Code sec. 201 et seq.).

The action was tried, pursuant to stipulation, on an agreed statement of facts in lieu of proof (R. 9), and findings were made by the Trial Judge (R. 15-17), in accordance with said agreed statement, of which the following are pertinent to this proceeding:

"That The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right-of-way in the Town of Chatham, Columbia County, New York."

"That in September 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood."

"That thereafter, the railroad company entered into a contract with the defendant,[3] an independent contractor

[3] The term "defendant" as used in these quotations means the petitioner herein.

engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid."

"*That defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract* and paid them at the rates per hour, as shown on Schedule 'A' annexed to said stipulation of December 1, 1939."

"That after October 24, 1938, until the completion of said work by the defendant under said contract, *each plaintiff worked for the defendant* the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed to said stipulation of December 1, 1939." (Italics supplied.)

No finding was made, and nothing in the record warranted a finding, as to the particular work done for your petitioner by any plaintiff in any week or at any time.

After trial, the complaint was dismissed upon the merits by the Trial Court (R. 18), and the dismissal was sustained first by the Appellate Division of the Supreme Court (R. 18-19) and thereafter by the Court of Appeals (R. 27) on the ground that, as your petitioner was engaged in local construction work not constituting interstate commerce, none of the plaintiffs could have been engaged in commerce.

After the filing by the plaintiffs in this Court of a petition for certiorari to review said judgment of dismissal, this Court rendered its decision in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 (1943), establishing as erroneous the ground underlying the decisions, hereinbefore referred to, of the New York courts (namely, that the nature of the employer's business, rather than the nature of the employees' activity, was controlling). Thereupon,

this Court, without hearing argument, entered an order directing that said judgment of dismissal of the Supreme Court of the State of New York "be, and the same is hereby reversed with costs on the authority of *Overstreet* v. *North Shore Corporation*, 284, decided February 1, 1943", and that "this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court". (R. 29-30) (318 U. S. 740)

Your petitioner then filed in this Court its petition for rehearing wherein your petitioner pointed out:

1. That under the construction of the Act by this Court in the *Overstreet* decision, recovery depends upon the particular work which a plaintiff has done and whether such work is so closely related to commerce "as to be in practice and in legal contemplation a part of it";

2. That, on the record herein, the particular work done by any plaintiff does not appear and that, therefore, a determination is impossible that the activity of any plaintiff was at any time so closely related to commerce "as to be in practice and in legal contemplation a part of it".

Upon consideration of your petitioner's application for rehearing, this Court amended its mandate by adding, after the direction that the cause be remanded for further proceedings not inconsistent with the opinion of this Court, the following caveat:

"and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (R. 30) (318 U. S. 742)

Notwithstanding the decision of this Court in the *Overstreet* case and the mandate of this Court, and notwithstanding the absence of any evidence as to "the nature of

the employment of any members of the class on whose behalf this suit has been brought", the plaintiff moved in the Supreme Court of the State of New York for summary judgment *upon the original record* in these proceedings, being the record which this Court had previously considered. The Supreme Court granted the plaintiff's motion for summary judgment and included interest on the double damages allowed. (R. 42) The Supreme Court was sustained in its action first by the Appellate Division, Third Department, (R. 51) and then by the Court of Appeals. (R. 63) On remittitur from the Court of Appeals, the order and judgment of that Court were made the order and judgment of the Supreme Court of the State of New York. (R. 62)

Thereupon, your petitioner filed in this Court its petition for certiorari and on November 6, 1944, this Court granted said petition, but limited said grant only to the interest issue presented.

After the entry of said order, the plaintiff having contended in its brief filed in opposition to the granting of certiorari that:

> "The only issue determined by the State courts, and the only issue presented to this Court, is one of civil procedure. *The petitioner herein could easily have required of the plaintiff*, (Pedersen) *proof of the details of each worker's duties*, by merely interposing on the motion for summary judgment a short answering affidavit." (P. 9) (Italics and parenthetical insertion supplied),

your petitioner filed in the Court of Appeals of the State of New York a petition seeking amendment of the remittitur of said Court so that said remittitur would state more explicitly the ground of decision and more fully reveal that, in issuing said remittitur, said Court had necessarily passed upon a question of federal law.

On December 2, 1944, the Court of Appeals granted your petitioner's motion and ordered its remittitur amended by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."[4]

Thereupon, your petitioner filed herein a petition for rehearing and, on December 18, 1944, this Court granted said petition and also your petitioner's petition for certiorari without limitation. (R. 66)

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[4] A certified copy of the order amending said remittitur has been filed with the Clerk of this Court and a copy of said order is set forth in an Appendix hereto.

SUMMARY OF ARGUMENT

I. *No plaintiff is entitled to recovery on the record herein.*

A. No plaintiff is entitled to recover unless, during the periods for which he seeks overtime compensation, he was engaged in commerce or in activity so closely related to commerce "as to be in practice and in legal contemplation a part of it". Engagement by employees, themselves, in "commerce" as that term is used in the Fair Labor Standards Act of 1938 is a prerequisite to recovery under the Act. (29 U. S. Code s. 207 (a); *A. B. Kirschbaum Company* v. *Walling*, 316 U. S. 517; *McLeod* v. *Threlkeld*, 319 U. S. 491). No claim is of course made that any plaintiff herein was engaged in the "production of goods for commerce," and no plaintiff was "engaged in commerce" as that term is used in the Act unless he would have been held to have been employed in "commerce" as that term is used in the Federal Employers' Liability Act, that is unless his individual activity was in or "so closely related to the movement of commerce as to be a part of it." (*Overstreet* v. *North Shore Corporation*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U.S. 491).

B. The record herein is wholly devoid of evidence that any plaintiff was in any week or at any time engaged in "commerce" or in activity "so closely related to the movement of commerce as to be a part of it." The record shows only that your petitioner was engaged in a project calling for the repair of an instrumentality of commerce and that the plaintiffs, *together with others*, "worked" for your petitioner. On such a project, certain activity, if performed by the plaintiffs, would constitute engagement by them in "commerce" and considerable other activity, if performed by the plaintiffs, would necessarily not constitute such engagement. No showing was made, and nothing enables a determination, of the particular work done by

any plaintiff in any week or at any time, and hence it is impossible to determine on the record whether, for example, any plaintiff (as distinguished from other employees not parties to the suit) actually performed any repair work (which would be within the coverage of the Act), or performed instead only incidental, preliminary or salvaging work (which, under the test of coverage laid down in the *Overstreet* and *McLeod* decisions, constitutes employment which is neither commerce nor "so closely related to the movement of commerce as to be a part of it").

C. The burden of proving coverage under the Act is on the party asserting coverage (*Warren-Bradshaw Drilling Company* v. *Hall*, 317 U.S. 88; *Super-Cold Southwest Company* v. *McBride*, 124 F. (2d) 90; *Schwarz* v. *Witwer Grocer Co.*, 49 F. Supp. 1003, affirmed in 141 F. (2d) 341; *Jones* v. *Springfield Missouri Packing Company*, 45 F. Supp. 997). This burden the plaintiffs have wholly failed to sustain. The record is wholly barren of evidence as to the activity of any plaintiff at any time or as to the closeness of the relation of such activity to the movement of commerce. The Court of Appeals erred in holding that the burden of going forward shifted to your petitioner. The burden of going forward does not shift from the party having the burden of proof until such party has produced sufficient evidence to sustain his burden as a matter of law. This the plaintiffs have not done. The record merely shows that the plaintiffs *might* or *might not* have been engaged in commerce. The plaintiffs have failed to establish their case and should have been denied relief.

II. *Interest cannot properly be added to statutory double damages in making an award to employees under the Act.*

A. The Act not only contains no provision for an award of interest but, by direct implication, excludes such an

award. The detailed provisions of the Act indicate that all compensable damage is provided for therein. The Act deals fully and in detail with the measure of recovery (29 U. S. Code s. 216 (b)) and makes no provision for interest. (*Campbell* v. *Zavelo*, 243 Ala. 361). Interest is in fact intentionally not provided for because of the double damages provision. Double damages are awarded to take care of the consequences of delayed payment (*Overnight Motor Transportation Company* v. *Missel*, 316 U. S. 572) and interest, when allowable as damages, is a remedy to repair the loss of the use of money due resulting from failure to pay on the due date. To allow double damages and interest would be to allow recovery for delayed payment twice.

B. The Court of Appeals erred in holding that interest may be awarded pursuant to the provisions of the New York Civil Practice Act. Congress having occupied the field, state interest statutes are inapplicable. (cf. *Murmann* v. *The N.Y., N.H. & H. R. R. Co.*, 258 N.Y. 447; *Louisiana & Arkansas Railroad Company* v. *Pratt*, 142 F. (2d) 847; *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* v. *Busby*, 41 F. (2d) 617). That state interest statutes are inapplicable to proceedings under the Act, is particularly clear in view of the detailed provisions of the Act with respect to damages and the evident intent of Congress apparent from the double damage provision that interest not be included. (*Berry et al.* v. *34 Irving Place Corporation*, 8 C.C.H. Labor Cases ¶62, 265 (S.D.N.Y. decided June 16, 1944); *Campbell* v. *Zavelo, supra.*)

ARGUMENT

POINT I

NO PLAINTIFF IS ENTITLED TO RECOVERY ON THE RECORD HEREIN.

A. No Plaintiff Is Entitled to Recover Unless He Was Engaged in Commerce or in Activity so Closely Related to the Movement of Commerce "as to be in Practice and Legal Contemplation a Part of It."[5]

1. *No Plaintiff is Entitled to Recover Unless He Was Himself Engaged In "Commerce" Within the Meaning of that Term, as Used in the Fair Labor Standards Act.*

An employee is entitled to the benefits of overtime compensation under the Fair Labor Standards Act if but only if he, himself, is engaged in interstate commerce or in the production of goods for such commerce.[5] This is unmistakably clear from the language of the Act itself. Section 7 (a) of the Act, upon which the instant claim to recovery is based, provides that

> "No employer shall, except as otherwise provided in this section, employ any of his employees *who is engaged in commerce or in the production of goods for commerce* * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Italics supplied.)

And the decisions of this Court have uniformly stressed that it is the character of the activity of the particular

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[5]The plaintiff does not contend (and there is no basis for contending) that either he or any of the members of the class on whose behalf this suit was brought, was engaged in "the production of goods for commerce" while in your petitioner's employ. The sole question to be considered is whether he or any of such employees was "engaged in commerce" while employed by your petitioner.

employee that determines coverage. Thus, this Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942):

> "But the provisions of the Act expressly make its application dependent upon the character of the employees' activities." (p. 524)

Similarly, the recent decision of this Court in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), reaffirmed this proposition, this Court saying:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive." (p. 497)

2. *No Plaintiff was "Engaged in Commerce" within the Meaning of That Term in the Act Unless His Particular Activity Constituted Commerce or was So Closely Related to the Movement of Commerce "as to be in Practice and in Legal Contemplation a Part of it."*

That no plaintiff was engaged "in commerce" within the meaning of that term in the Fair Labor Standards Act of 1938 unless he would be held to have been employed "in commerce" as that term was used in the Federal Employers' Liability Act (45 U. S. Code §51 et seq.) prior to its recent amendment and that, therefore, no plaintiff was engaged "in commerce" within the meaning of that term in the Fair Labor Standards Act unless his individual activity was in commerce or so closely related to the movement of commerce "as to be in practice and in legal contemplation a part of it" is now firmly established by the decisions of this Court. Thus in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 (1943), in holding sufficient the allegations of a complaint under the Act which recited that one employee operated a drawbridge on a toll road over which extensive interstate traffic moved, that another employee was engaged "in maintenance and repair work

on the road and the bridge" and that still another employee sold and collected toll tickets from vehicles using said toll road in interstate commerce, this Court said:

> "A practical test of what 'engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act * * *." (p. 128)
>
> "We think *that practical test should govern here.*" (p. 129) (Italics supplied.)
>
> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. * * * We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen*[6] and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention." (pp. 131-2)

And in applying the test so laid down, this Court emphasized the individual activity of the employees who brought the action, saying:

> "The work of *each petitioner* in providing a means of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' (*Pedersen's* case, *supra*), and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act." (p. 130) (Italics supplied.)

Similarly, but even more precisely, this Court held in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), that an employee engaged in work related to the repair of an instrument of commerce was engaged in commerce only if his activity was such that he would be held to have been employed "in

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[6] *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company*, 229 U.S. 146 (1913), not the instant case.

commerce" under the Federal Employers' Liability Act. There this Court said:

> "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum Co.* v. *Walling, supra,* 520. However, *the test of the Federal Employers' Liability Act* that activities *so closely related to interstate transportation* as to be in practice and legal relation a part thereof are to be considered in that commerce, *is applicable to employments 'in commerce' under the Fair Labor Standards Act.*" (p. 495) (Italics supplied.)

and further:

> "*The test under this present act,* to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but *whether they are actually in or so closely related to the movement of the commerce as to be a part of it.* Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'" (p. 497) (Italics supplied.)

In adopting, in the case of employees engaged in work relating to the repair of an instrumentality of commerce, the test of the closeness of the relation of the particular employee's work to the movement of commerce, this Court gave due recognition to the history and language of the Act. It was obvious, as this Court recognized, that the term "engaged in commerce" did not comprehend activity merely affecting commerce. To have interpreted the term "engaged in commerce" as comprehending activity merely affecting commerce would have been to have ignored the distinction in the Act itself between engagement in "commerce" and engagement in the "production of goods for commerce"; to have ignored the fact that Congress did not incorporate into the Fair Labor Standards Act, the language of the then existing National Labor Relations

Act with regard to activities "affecting commerce"; and to have ignored the legislative history of the Fair Labor Standards Act which shows that coverage of activities "affecting commerce" was considered and rejected. (See *McLeod* v. *Threlkeld, supra,* at p. 493). On the other hand to have construed engagement in "commerce" to include activities which were only "commerce" within the definition in Section 3 of the Act would have resulted in ignoring the closeness of the relation between the words engaged "in commerce" in the Act and the words employed "in commerce" in the Federal Employers' Liability Act which latter language had been brought specifically to the attention of Congress (See *Overstreet* v. *North Shore Corporation, supra,* at p. 132 and footnote (4) on said page). It was only natural, therefore, that this Court should have concluded that, when Congress referred to employees "engaged in commerce", it meant, in the case of employees engaged in work relating to an instrumentality of commerce, to afford coverage to those employees, and only those, who would be held to have been employed "in commerce" under the Federal Employers' Liability Act, that is to employees whose activity was either in commerce or so closely related to the movement of commerce "as to be in practice and in legal contemplation a part of it."

The test of whether any plaintiff was employed "in commerce", as those words were used in the Federal Employers' Liability Act cases (and hence, as shown in the *Overstreet* and *McLeod* decisions the test of whether any plaintiff herein was "engaged in commerce" as those words are used in the Fair Labor Standards Act), is whether the particular employee was employed in such a capacity that his work was in, or had so close and intimate a relation to the movement of commerce as to be a part of it. For, it has been universally held in the Federal Employers' Liability Act cases that, where an employee was engaged

in actual repair work on an instrumentality of commerce (as was alleged in the complaint in the *Overstreet* case and admitted by motion to dismiss) or was engaged in keeping tracks clear for interstate movement, he was employed "in commerce." But where the employee's work was a step or more removed from present transportation activity, the employee was held not to be employed "in commerce" although his work was clearly of importance to the railroad, as in *Shanks* v. *Delaware, Lackawanna & Western Railroad Company*, 239 U. S. 556 (1916)

(wherein an employee was injured while moving a heavy repair shop fixture);

Chicago & North Western Railway Co. v. *Bolle*, 284 U.S. 74 (1931)

(wherein the employee's work was the *generating of steam which was used to heat* various structures and facilities, including bunk *cars for track maintenance and bridge workers*, and was also used *to prevent the freezing of a turntable*);

Chicago & Eastern Illinois Railroad Co. v. *Industrial Commission of Illinois*, 284 U.S. 296 (1932)

(wherein the employee operated a power hoist by means of which coal was lifted into tender supply chutes);

New York, New Haven and Hartford Railroad Co. v. *Bezue*, 284 U. S. 415 (1932)

(wherein an employee was injured while moving locomotive wheels to a roundhouse where they were to be replaced on a locomotive undergoing repairs)

(decisions which are cited with approval in the *Overstreet* and *McLeod* decisions). As stated in the *McLeod* decision with respect to the *Bolle*, *Bezue* and *Commission* cases *(supra)*:

"These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. *The test under this present act,* to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but *whether they are actually in or so closely related to the movement of the commerce as to be a part of it.*" (pp. 496-7) (Italics supplied.)

B. The Record Contains No Evidence That Any Plaintiff Was At Any Time Engaged in Commerce or in Activity so Closely Related to the Movement of Commerce "as to be in Practice and in Legal Contemplation a Part of It."

To be entitled to recovery herein, each plaintiff must, as hereinbefore pointed out, have been engaged, during overtime periods, in work having so close and intimate relationship to the movement of commerce as to be a part of it. Activity which merely affected or indirectly related to the movement of commerce would not warrant recovery.

There is nothing in the record in this proceeding which would warrant a conclusion that any plaintiff (*as distinguished from other employees of your petitioner who are not parties to this proceeding*) at any time did any work for your petitioner having such a close or intimate relationship to the movement of commerce. Nor is there anything to warrant a conclusion that any plaintiff was not engaged in an activity which merely affected or indirectly related to the movement of commerce and which is clearly not within the coverage of the Act. *No plaintiff*

herein has shown the nature and character of the activity in which he was engaged during all or any part of the period of his employment by your petitioner or the closeness of the relation of such activity to the movement of commerce.

The record establishes only that your petitioner entered into a contract with an interstate carrier for the construction of new abutments for two bridges and repair work upon substructures of two other bridges owned by the carrier; that the plaintiffs (*together with others*) were employed by your petitioner in "doing work under the contract"; and that the plaintiffs in fact "worked" for your petitioner. (R. 15-17) The particular work done by any plaintiff at any time nowhere appears in the record. Nothing in the record shows more than that the plaintiffs' work was in relation to a repair project and this was held to be an insufficient showing in the *McLeod* decision. The following are the only pertinent facts of record:

> "That thereafter, the railroad company entered into a contract with the defendant,[7] an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid."
>
> "*That defendant employed plaintiffs,* together with other individuals, *as its employees in doing work under said contract* and paid them at the rates per hour, as shown on Schedule 'A' annexed to said stipulation of December 1, 1939."
>
> "That after October 24, 1938, until the completion of said work by the defendant under said contract, *each plaintiff worked for the defendant* the number of hours

[7] The term "defendant" as used in these quotations means the petitioner herein.

per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed to said stipulation of December 1, 1939." (Italics supplied) (R. 15-17).

The error, which led the Trial Court to the conclusion that the plaintiffs were entitled to recover, resulted from the assumption that the plaintiffs were entitled to recover if their work was substantially related to repair work and the inference that the work of the plaintiffs was so related. The error in assuming that work substantially related to repair work constitutes engagement in commerce resulted from an improper interpretation of the holding of this Court in the *Overstreet* case and the failure of the Trial Court to apply the test laid down in the Federal Employers' Liability Act cases. The *McLeod* case, decided the day before the Trial Court's opinion was rendered, has made clear that the test of the Federal Employers' Liability Act cases governs, and that under those cases work may be substantially related to repair work (as was the work of the plaintiff in the *McLeod* case) and yet may not be so closely related to the movement of commerce "as to be in practice and in legal contemplation a part of it." Moreover, as nothing appears in the facts as to what any plaintiff did, or as to what all plaintiffs as a group did, the degree of relationship of the plaintiffs' work to the work of repair may not properly be inferred. As Mr. Justice Schenck, in his dissenting opinion in the Appellate Division, has pointed out:

> "The most that can fairly be inferred from the agreed statement of facts is that plaintiffs did work in connection with the construction and repair project on which defendant was engaged, there being nothing in the record to indicate the relationship which the respective tasks of the several plaintiffs bore to the construction and repair work." (R. 56)

It is noteworthy, as will hereinafter be pointed out, that the Court of Appeals did not fall into the error of the Trial Court.

The record affords no basis for applying the Federal Employers' Liability Act test of coverage held applicable to cases under the Fair Labor Standards Act in the *Overstreet* and *McLeod* decisions. Nothing in the record enables a determination as to whether any individual workman was performing work which, however important, was only incidental to, or only preliminary to, or only expedited the actual repair work being performed by other employees, as were the workmen in the cases which denied coverage under the Federal Employers' Liability Act and are cited with approval in the *Overstreet* and *McLeod* decisions. The record affords no answer as to whether any particular plaintiff was at any time engaged in actual repair work on an instrumentality of commerce (as an employee in the *Overstreet* case was admitted to be) or was instead, engaged only, for example,

(a) in setting up or maintaining stationary derricks, platforms and pile drivers,

(b) in oiling or cleaning machinery,

(c) in trucking or unloading supplies to be used when and if needed on the project,

(d) in the repair and sharpening of tools,

(e) in scraping and painting iron work,

(f) in treating wood to be used in forms

or in any one of the many other preliminary or incidental occupations which, in the decisions in and following the *Shanks, Bolle* and *Industrial Commission* cases (*supra*), have been held to be employments which are neither commerce nor so closely related to the movement thereof "as to be in practice and in legal contemplation a part of it".

The record fails even to exclude any plaintiff from that substantial group of employees on any repair or construction project whose duties have absolutely no relation to the progress of the actual construction work but are concerned entirely with the salvage and disposition, solely for the contractor's benefit, of lumber and other materials which cannot further be used on the particular project.

The record shows merely that your petitioner was engaged in a project, certain work in the course of which constitutes "commerce" and certain other work in the course of which does not constitute "commerce" and that the plaintiffs *together with others* did work in connection with such project. The record gives not the slightest hint of what work was done by any plaintiff at any time or whether such work was of the kind constituting commerce or was of the kind not constituting commerce. In effect, the record merely shows the nature of the employer's business and is silent as to the nature of the activity of any plaintiff. It has been repeatedly held by this Court that it is the character of the employee's and not of the employer's activity which is controlling.

The inadequacy of the present record to warrant recovery by any plaintiff has heretofore been noted by this Court. When this proceeding was formerly before this Court, your petitioner, in its petition for rehearing, pointed out that nothing in the record showed either the nature of the activity of any plaintiff or that such activity was so closely related to the movement of commerce as to be a part of it. This Court thereupon amended its mandate in recognition of the fact that the record then before this Court contained no

> ". . . . determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (R. 30)

The record now before this Court is the same record, in this respect, as the record previously before this Court. The deficiency in the record, so pointedly referred to, has not been cured.

Both the plaintiffs and the Court of Appeals have recognized that the project upon which your petitioner was engaged called for various different activities, some of which if performed by the plaintiffs would constitute engagement in commerce and others of which obviously would not constitute commerce and that the record is silent as to the nature of the activities of the plaintiffs. The Court of Appeals' order amending its remittitur shows clearly its conclusion in this regard, although it erroneously believed (as will hereinafter be pointed out) that the burden of producing evidence as to these employees' activities fell upon your petitioner. The plaintiffs, however, recognize not only the varying characteristics of the work performed upon the project and the silence of the record as to their own activity, but also that the burden of producing evidence with regard to those activities was theirs. The plaintiffs have relied in defense of the Court action below on local procedural grounds which not only are unsound[8] but which have been repudiated by the Court of Appeals in its order amending its remittitur. In their brief filed herein and entitled—Brief in Opposition to Petition for Writ of Certiorari—the plaintiffs stated that:

> "The only issue determined by the State courts, and the only issue presented to this Court, is one of civil procedure. *The petitioner herein could easily have required of the plaintiff* (Pedersen) *proof of the details of each worker's duties*, by merely interposing on the

[8] Rule 113 of the New York Civil Practice Act referred to by the plaintiffs did not require an answering affidavit under the circumstances of the present case.

motion for summary judgment a short answering affidavit." (P. 9) (Italics and parenthetical insertion supplied).

C. The Burden was on the Plaintiffs to Show That They Were Engaged in "Commerce" and They Have Failed to Sustain That Burden. The Court of Appeals Erred in Holding That the Burden of Going Forward with Evidence That the Plaintiffs Were Not So Engaged Shifted to Your Petitioner On the Present Record.

The burden of proving coverage under the Act is on the party asserting coverage. This is the normal rule as to burden of proof and nothing in the Act provides for a shifting of the burden. The Act provides for recovery by employees if they have not received the compensation to which they are entitled and employees are entitled to overtime compensation under the Act only if they were, during the periods for which overtime compensation is claimed, engaged in "commerce" or in the "production of goods for commerce". It is not surprising, therefore, that this Court early held that the burden is on employees seeking recovery under the Act to show that they come within the coverage of the Act. Thus, this Court pointed out in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88 (1942):

> "The application of the Act depends upon the character of the employees' activities. *Kirschbaum Co.* v. *Walling*, *supra*, p. 524. The burden was therefore upon respondents to prove that, in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, *and* that such production was for interstate commerce." (p. 90) (Italics supplied.)

Numerous decisions of other Courts are to the same effect. Thus, in *Super-Cold Southwest Company* v. *McBride*, 124 Fed. (2d) 90 (1941), the Circuit Court of Appeals for the Fifth Circuit held:

> "An employee working both inter-state and intra-state must point out what part of his work was in intra- and what part in inter-state commerce." (p. 92)

Similarly in *Schwarz* v. *Witwer Grocer Co.*, 49 F. Supp. 1003 (N. D. Iowa, 1943) affirmed, 141 Fed. (2d) 341 (C.C.A. 8, 1941), the District Court stated:

> "The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed." (p. 1004)

So also in *Jones* v. *Springfield Missouri Packing Company*, 45 F. Supp. 997 (S.D. Mo., 1942), the Court said:

> "It has been repeatedly held that though the employer may in fact be engaged in interstate commerce, yet this would not entitle an employee to recover except in those cases where his own work was in interstate commerce or the production of goods for interstate commerce." (p. 999)

See accord *Jax Beer Company* v. *Redfern*, 124 F. (2d) 172, 174 (C.C.A. 5, 1941).

The plaintiffs have wholly failed to sustain the burden, which was theirs, of showing that they were engaged in "commerce". The record is wholly barren of evidence as to the activity of any plaintiff at any time or of the closeness of the relation of any plaintiff's activity at any time to the movement of commerce. (See pages 17 to 23 hereof.)

The Court of Appeals erred in holding that the burden of going forward with evidence that the plaintiffs were not engaged in "commerce" became your petitioner's on the present record. As has heretofore been pointed out, the burden of proof was on the plaintiffs and they have wholly failed to sustain that burden. On the record no possible basis existed for shifting the so-called "burden of going forward" to your petitioner. The burden of going forward with evidence does not shift from the party having the burden of proof, until that party has produced sufficient evidence to sustain the burden of proof as a matter of law. Wigmore on Evidence (3rd ed.) §2489. In this proceeding, the plaintiffs have not produced such evidence. The record shows no more than that the plaintiffs *might* or *might not* have been engaged in "commerce". In a project such as that in which your petitioner was engaged, there are obviously many separable activities, some of which (such as actual repair work) if performed by the employees represented by the plaintiff, would constitute engagement in commerce and others of which (such as preliminary, incidental or salvaging work) obviously would not constitute such engagement. Certainly, on a showing that the particular employees, on whose behalf the plaintiff is suing were engaged on a project, separable and identifiable activity in connection with which would necessarily not have been so closely related to commerce as to be a part of it, and without any showing as to the particular activity of any plaintiff in any week or at any time, the plaintiffs have not produced sufficient evidence to sustain their burden of proof as a matter of law, and there is no basis whatsoever for the holding of the Court of Appeals that the burden of going forward shifted to your petitioner. The plaintiffs failed to establish their case and should have been denied relief.

POINT II

INTEREST CANNOT PROPERLY BE ADDED TO STATUTORY DOUBLE DAMAGES IN MAKING AN AWARD TO EMPLOYEES UNDER THE ACT.

A. THE FAIR LABOR STANDARDS ACT OF 1938 PROPERLY CONSTRUED EXCLUDES AN AWARD OF INTEREST.

Not only does the Fair Labor Standards Act contain no provision for the inclusion of interest in a judgment rendered thereunder, but rather, properly construed, it precludes such an award. Employee actions under the Act are provided for in Section 16 (b) thereof, wherein is set forth with particularity detailed provision for the damages recoverable. Section 16 (b) provides in terms as follows:

> "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (29 U.S. Code §216(b))

Thus section 16 (b) provides that successful plaintiffs shall recover "their unpaid minimum wages, or their unpaid overtime compensation, as the case may be," and "an additional equal amount as liquidated damages." Furthermore, provision is made for the allowance of a "reasonable attorney's fee to be paid by the defendant" and "costs of the action." In view of the circumstance that detailed provision is made for the elements of recoverable damage, including provision for attorney's fees and for costs, it is apparent that the whole subject of recoverable damages is covered by the section. In view of the particularity of the treatment of recoverable damages,

it is apparent that all elements of recoverable damage were intended to be provided for and that the damage provisions are intended to be exclusive. As stated by the Court in *Campbell* v. *Zavelo*, 243 Ala. 361 (1942):

> "In our opinion interest should not be computed on the double payment for overtime work authorized by the Act of Congress. That is to say, the provisions of the Act of Congress are the limits of liability which can be imposed on an employer * * *." (p. 366)

The failure to provide for interest is for an obvious reason and one, which, in and of itself, conclusively demonstrates that interest may not properly be awarded. Interest, when allowed in an action, is allowed as damages for the retention of payments beyond their due date. It is the damages, or part of the damages, a defendant commonly pays for delay. But the Act here has provided for double damages as the remedy for all injury, including the injury of delay. As this Court pointed out, in *Overnight Motor Transportation Company* v. *Missel*, 316 U.S. 572 (1942), the statutory provision for liquidated damages recognizes that,

> "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (pp. 583-584)

It is obvious that Congress did not intend the unfair result of awarding double damages to take care of all the consequences of delayed payment and then to allow the award of interest, itself the price normally paid for delay, on those double damages. Two remedies for delayed payment are clearly not intended.

It is no answer to say that this Court held in the *Missel* case that the double damages allowed under the Act are compensatory and not a penalty. Interest, when allowable, is compensatory. It compensates for the loss of the

use of money. While double damages are, broadly speaking, compensatory, they are compensatory for all loss suffered as a result of the non-payment, when due, of the wages required by the Act and necessarily include the loss of the use of money for which interest is normally allowable.

B. The Court of Appeals Erred in Holding That Interest May Be Awarded Pursuant to the Provisions of the New York Civil Practice Act.

The Court of Appeals, recognizing that no provision is contained in the Fair Labor Standards Act of 1938 authorizing an award of interest in employee actions under said Act, has held that interest may nevertheless be awarded by virtue of the provisions of a local statute, namely section 480 of the New York Civil Practice Act. (R. 65).

The Court of Appeals erred in holding applicable to actions under the Fair Labor Standards Act the interest provisions of the New York statute. Interest may not be awarded pursuant to a state statute in an action under the Act. Congress has, by its enactment of the Act, as between itself and the State legislature, completely and exclusively occupied the field in the case of employees engaged in "commerce" and in the "production of goods for commerce." Congress has prescribed the standards to be observed and, in detail, the remedies for failure to conform to the required standards. The states may no more add to, than they may detract from, those remedies.

An analogy exists in the decisions under the Federal Employers' Liability Act. In cases under the latter Act it has been consistently held that interest, authorized by state statute, may not be included in a judgment, under the federal act. Thus, in *Murmann* v. *The New York, New*

Haven and Hartford Railroad Company, 258 N.Y. 447 (1932), it was held that the addition of interest, pursuant to a state statute, to a verdict returned under the Federal Employers' Liability Act was improper. In that case the Court pointed out,

> "The Federal legislation covers the whole field, and the power of the States is not broad enough to change the assessment of the damages as determined by the verdict." (p. 450)

The same principle has been consistently recognized in other decisions under the Federal Employers' Liability Act, both prior and subsequent to the *Murmann* decision. Thus, in *Louisiana & Arkansas Railroad Company* v. *Pratt,* 142 F. (2d) 847 (1944), the Circuit Court of Appeals for the Fifth Circuit held that:

> "The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in such actions prior to verdict. Since the Act is exclusive, state statutes upon the measure of damages, including Louisiana Act 206 of 1916, are superseded in so far as they are in conflict." (pp. 848-849)

Similarly, in *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Busby,* 41 F. (2d) 617 (1930), the Circuit Court of Appeals for the Ninth Circuit held that a Montana statute providing for the payment of interest "was not controlling in actions arising under the Act."

And in *Mobile & Ohio R.R. Co.* v. *Williams,* 219 Ala. 238 (1929), the Court said:

> "Such act is paramount and exclusive, and the defendant's liability cannot be extended by any state statute or rule of construction." (p. 247)

See accord *Bennett* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 187 Iowa 897 (1919).

An even stronger basis exists for holding local interest statutes inapplicable in cases involving the Fair Labor Standards Act. As hereinbefore pointed out, the Fair Labor Standards Act deals in detail with the damages recoverable and an award of interest is not merely not provided for but is inconsistent with the double damage provision thereof. Mr. Justice Schenck so noted in his dissenting opinion in the Appellate Division herein (R. 57) as did Chief Justice Lehman of the Court of Appeals with whom concurred two other Justices. (R. 65). The District Court for the Southern District of New York so held in *Berry et al* v. *34 Irving Place Corporation*, 8 C.C.H. Labor Cases ¶62,265, (decided June 16, 1944) and the Supreme Court of Alabama so held, in *Campbell* v. *Zavelo* (*supra*).

The decision of this Court in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487 (1941), relied on by the Court of Appeals, furnishes no support to the majority opinion of that Court. There a local interest statute was properly held applicable in an action for breach of contract, but no claim under a federal statute was involved. Here, unlike in the *Klaxon* case, a federal statute covers the field and by direct implication excludes an award of interest. As pointed out in *Berry* v. *34 Irving Place Corporation* (*supra*):

> "In the instant case jurisdiction is not founded on diversity but upon a Federal right. The Federal legislation which is the basis of the action 'covers the whole field, and the power of the States is not broad enough to change the assessment of the damages . . . .'. *Murmann* v. *N. Y., N.H. & H. R. R. Co.*, 1932, 258 N.Y. 447, 450. The statutory provision of the Fair Labor Standards Act for liquidated damages is designed to compensate for the damages resulting from the retention of the workmen's pay. *Overnight Motor Co.* v. *Missel*, 1942, 316 U. S. 572, 583 [5 Labor Cases p. 51, 145] which

otherwise might be 'too obscure and difficult of proof'. Nothing in the statute suggests anything but a legislative intention to provide a uniform rule as to such damages, a rule in no way dependent upon the varying standards and provisions of the several states."

Respectfully submitted,

HENRY E. FOLEY
Counsel for Petitioner

Dated: January 6, 1945

APPENDIX A.

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the *thirtieth* day of *November*, A. D. *1944*.

PRESENT, HON. IRVING LEHMAN,
Chief Judge, Presiding.

.....

CHRIS PEDERSEN, *ind., and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

vs.

J. F. FITZGERALD CONSTRUCTION COMPANY,
Appellant.

.....

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal

statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

AND the Supreme Court, Columbia County, State of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

RAYMOND J. CANNON
Deputy Clerk.

(SEAL)

APPENDIX B.

Fair Labor Standards Act of 1938 (29 U. S. Code, Sections 201, *et seq.*).

Sec. 3 (b) "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" (Sec. 203 [b]).

Sec. 7 (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 207 [a]).

Sec. 16 (b) "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" (Sec. 216 [b]).

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OCT 10 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1944.

No. 496.

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

against

CHRIS PEDERSEN, individually and as Agent and Representative for and in behalf of himself and all other employees of the Defendant similarly situated,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

WILLIAM E. J. CONNOR,
Counsel for Respondent,
609 Warren Street,
Hudson, N. Y.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1944

Subject Index.

		Page
I.	Opinions Delivered in the Courts Below	1
II.	Jurisdiction	1
III.	Statement of the Case	2

ARGUMENT.

POINT I: The question sought to be raised herein having twice before been passed upon by this Court in the same case and no federal question existing, no reason exists for the issuance of the writ 7

POINT II: The award of interest on the judgment was proper 12

Conclusion 17

INDEX OF CASES CITED.

Bernhard v. Rochester German Ins. Co., 79 Conn. 388 16

Browning v. City of Waycross, 233 U. S. 16 4

Calvin v. Huntley, 178 Mass. 29 12

Chicago & Eastern Illinois Railroad Co. v. Ind. Comm., *et al.*, 284 U. S. 296 11

Cox v. Lykes Brothers, 237 N. Y. 376 12

Darlington v. Gates Land Co., 151 Wis. 461 16

Faber v. New York, 222 N. Y. 255 15

Freedman v. Hart & E. Co., 162 Misc. N. Y. 487 14

Funkhouser v. J. B. Preston Co., 290 U. S. 167 15

261 N. Y. 140 16

General Supply & Const. Co. v. Goelet, 241 N. Y. 28, 39 16

Greater New York v. Philadelphia and Reading, 252 App. Div. N. Y. 883 13

Greenberg v. Arsenal Building Corporation, *et al.*, ... F. 2d 12

	Page
Harsave v. Mid-Continent Petroleum Corp., 36 F. Supp. 233	14
Klausner v. Queens Fur Dressing Co., Inc., 130 Misc. N. Y. 579	16
LaGuardian v. Austin-Bliss General Tire Co., 41 F. Supp. 678	14
Maddox v. Jones, 42 F. Supp. 35	14
McLaughlin v. Brinkerhoff, 222 App. Div. N. Y. 458	13
McLeod v. Threlkeld, 319 U. S. 491	7
Morgan Lake Co. v. New York, N. H. & H. R. R. Co., 262 N. Y. 234	13
Northwestern Yeast Co v. Broutin, 133 F. 2nd 628	12
Overnight Motor Transportation Co. v. Missel, 316 U. S. 572	12
Overstreet v. North Shore Corporation, 318 U. S. 125	4, 7
Pedersen v. D., L. & W. RR. Co., 229 US. 146	3, 9, 10, 11
Pedersen v. J. F. Fitzgerald Construction Co., 318 U. S. 740	7
318 U. S. 742	11
Quinn v. Sigretto, 229 App. Div. N. Y. 727	14
Robertson v. Argus Hosiery Mills, 32 F. Supp. 19	14
Schumacker v. Leterman, *et al.*, 14 Fed. Supp. 1015	16
Sneider v. Sports Vogue, 35 N. Y. S. 2nd 341	15
Sweeney v. City of New York, 173 N. Y. 414	13
White v. Miller, 78 N. Y. 393	13
Wright v. State of New York, 223 N. Y. 44	12

INDEX OF STATUTES CITED.

Judicial Code, 28 U. S. C. 344 (b)	2
Fair Labor Standards Act of 1938, 29 U. S. Code 201, *et seq.*	2
Rule 113 of Rules of Civil Practice, New York State	6
Section 480 of Civil Practice Act, New York State	12

IN THE

Supreme Court of the United States

October Term, 1944.

No. 496.

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

against

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Opinions delivered in the courts below.

The citations contained in petitioner's brief are correct as to the opinions delivered in the courts below.

II.

Jurisdiction.

The petition seeks the issuance of a writ of certiorari pursuant to the provisions of Section 237 (b) of the

Judicial Code (28 U. S. C. 344 [b]), for the purpose of a review of a final judgment rendered by the Supreme Court of the State of New York on remittitur of the Court of Appeals of that state. The final judgment was rendered in a proceeding in which the petitioner's claims under a statute of the United States of America, namely, the Fair Labor Standards Act of 1938, were granted.

The decision of the Court merely carried out the mandate of the United States Supreme Court in its final decisions made February 8, 1943, and March 8, 1943 (318 U. S. 740; 318 U. S. 742). The issue raised is merely a question of procedure in the state courts over which this Court has never exercised any jurisdiction.

No issue of constitutionality is presented.

III.

Statement of the Case.

Because the statement of the case as set forth by the petitioner in its brief (pp. 1-6, inc.) does not in the opinion of the respondent in some respects correctly, and in others not adequately, state the facts, the following statement is made.

The action was brought by one Chris Pedersen, individually and as agent for other employees similarly situated, to recover overtime wages, liquidated damages and counsel fees due them under the provisions of Sections 7 and 16 of the Federal Fair Labor Standards Act of 1938 (29 U. S. Code 201, *et seq.*). The case was tried in the Supreme Court of the State of New York upon an agreed statement of facts which has never since been altered, modified or changed in any respect. That agreement, so far as pertinent, was:

In September of 1938, abutments supporting two bridges were completely washed out and destroyed and the substructures of the other two bridges were destroyed by flood. Thereafter, the railroad company entered into a contract with the defendant, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid. Defendant employed plaintiffs as its employees in doing work under the contract. These bridges were interstate bridges which had previously been dedicated to commerce.

The Trial Court dismissed the complaint and wrote an opinion (173 N. Y. Misc. 188; R. 12-15, inc.), holding substantially that it was the nature of the employer's duty that determined coverage under the act, the Court stating:

"Where the railroad engaged in interstate commerce itself repaired a bridge being used as an instrumentality of such commerce, an employee engaged in such operation is engaged in interstate commerce (*Pedersen v. Delaware, Lackawanna & Western R. R.*, 229 U. S. 146). * * * No such theory applies to the work of this defendant which was not engaged in interstate commerce at all."

The respondent then appealed to the Appellate Division, Third Department, of the State of New York, and the decision of lower Court was upheld by a divided vote of three to two, Mr. Justice Bliss writing a dissenting opinion, in which opinion Chief Justice Hill concurred. The majority opinion again holding that it was the nature of the employer's business which determined coverage under the act, the majority opinion stating:

"While the railroad company was obviously engaged in interstate commerce the defendant was an independent contractor employed by the rail-

> road to perform work clearly local in its character and separate and distinct from such commerce (*Browning v. Waycross*, 233 U. S. 16, 22). Plaintiffs were at no time employed by the railroad company" (262 App. Div. 665, R. 21).

The respondent herein then appealed to the Court of Appeals of the State of New York, which Court, without opinion, upheld the decision of the two lower courts (288 N. Y. 287).

Respondent herein then petitioned this Court for a writ of certiorari directed to the Supreme Court of the State of New York. The writ of certiorari was granted (318 U. S. 740). Upon this application the petitioner herein presented a brief to this Court in which it asked for a denial of said writ chiefly upon the grounds that the decision of the Court of Appeals constituted no broader holding than that the engagement in new construction of an instrumentality of commerce is not engagement in interstate commerce (see brief of Henry E. Foley and Charles E. Nichols in opposition to petition for writ of certiorari; October Term, 1942, Case No. 396).

That none of the lower courts had held that this work was new construction was pointed out to this Court in a reply brief of the respondent herein. This fact was plain in the record, for in the opinion of Mr. Justice Bliss the following appeared:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such" (R. 25).

The writ of certiorari was granted on the authority of *Overstreet v. North Shore Corporation*, 284, decided February 1, 1943 (318 U. S. 125).

After the reversal by this Court of the judgment, the petitioner herein made application to this Court for a re-argument of the case. This Court promptly denied the application with the following proviso:

> "* * * and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought" (318 U. S. 742, R. 30).

The brief of the petitioner in application for a re-argument which was denied, contained the same reasons and argument as is now presented to this Court, and asked for identical relief. Since that time the petitioner has never attempted in any manner whatsoever to modify its stipulation nor to compel the respondent to amplify by proof the details of the employees' duties, but has in all courts contended that the modification by this Court was in fact a reversal of its prior decision, and has contended that the state courts, because of this modification, were duty-bound to dismiss the same complaint on the same record, which this Court in its decision held should not have been dismissed in the original court.

In its application for a re-argument before this Court, the petitioner herein intimated to this Court that some of the forty plaintiffs had been engaged in work for the defendant not so closely connected with interstate commerce as to be in legal contemplation a part of it, and we believe that this intimation prompted this Court in making the modification of its original judgment. After the Supreme Court decision was modified, the respondent herein refrained from the issuance of execution or of taking any other legal proceedings in the matter, awaiting one of the many procedures which were open to the defendant whereby it might attempt to avail itself of the benefits of this modification. The defendant, however, took no such procedure, nor has it as yet taken any such

procedure, but on the contrary moved once more in the Supreme Court of the State of New York for a dismissal of the complaint, contending on this motion (for dismissal of the complaint) (R. 34) that under the law of the State of New York no new trial should or could be had, and that the New York State Courts could and should grant, on the same record, the relief which the United States Supreme Court had refused. This motion for a dismissal of the complaint having been made, the plaintiff then became entitled to and did move on the record for summary judgment under Rule 113 of the Rules of Civil Practice of the State of New York (R. 35). Both motions were heard in the Supreme Court of the State of New York at the same time. When this motion for summary judgment was made the defendant became again entitled to avail itself of the benefits given it by the modification of the United States Supreme Court, for it could have then introduced answering affidavits setting forth that there was a dispute, which should be tried, as to the nature of the employment of any of the members of the class on whose behalf this action has been brought. The petitioner herein, however, submitted no answering affidavits whatsoever, and based its entire argument upon the contention that the complaint should be dismissed and that it consequently followed that if the complaint were dismissed that the motion for summary judgment could not be granted. Under this state of the pleadings the Supreme Court of the State of New York made the same decision which the United States Supreme Court had twice before made. It denied the defendant's motion for a dismissal of the complaint, and granted the plaintiff's motion for summary judgment. The opinion, handed down May 21, 1943 (R. 43) is unreported.

From this decision the petitioner herein appealed to the Appellate Division of the State of New York, Third Judicial Department. The Appellate Division sustained the lower court (266 App. Div. N. Y. 1032, R. 51).

The petitioner herein again appealed to the Court of Appeals of the State of New York which sustained the decisions of the lower Courts (293 N. Y. 126, R. 63).

ARGUMENT.

POINT I.

The question sought to be raised herein having twice before been passed upon by this Court in the same case and no federal question existing, no reason exists for the issuance of the writ.

The decision in the case at bar, *Pedersen v. Fitzgerald Construction Company* (318 U. S. 740), based upon the authority of the case of *Overstreet v. North Shore Corporation* (318 U. S. 125) and the decision of this Court in *McLeod v. Threlkeld* (319 U. S. 491), wherein the Court again cited with approval the case at bar (318 U. S. 740) by stating "so are employees of contractors when the employees are engaged in repairing bridges of interstate commerce," clearly and definitely establishes that men engaged in the repair of bridges are engaged in interstate commerce and are entitled to the protection of the Federal Fair Labor Standards Act. There can, therefore, be no uncertainty as to the obligation of employers as to their employees engaged in the repair of interstate bridges as respondent indicates.

When the agreed stipulation of facts were drawn there were 40 plaintiffs. The defendant might have elected to compel each one of them to prove the nature of his work. It elected, however, to stipulate as to this. It is obvious that in the repairing of a bridge where a portion of the work is the construction of new abutments and the other portion is repair of substructures, that there are many

different types of work to be done on that bridge. It, therefore, became necessary in describing the nature of the work performed by 40 plaintiffs to make a broad stipulation which would cover the nature of the duties of all 40 plaintiffs, and still have that stipulation show that their work was in connection with the repair of interstate railroad bridges. When the agreed stipulation of facts are read, it will be seen that they provided as follows:

1. That the bridges were on railroads whose lines ran between the State of New York and the Commonwealth of Massachusetts (R. 9).

2. That the New York Central Railroad entered into a contract with the defendant (R. 9).

3. That the contract entered into between the railroad and the defendant provided for nothing except (R. 9)

   a. The construction of new abutments under the two bridges where the abutments had been washed out, and

   b. The repair of the substructures of the other two bridges which had been damaged.

4. The defendants employed the plaintiffs in doing the work under said contract (R. 10).

To quote Mr. Justice Foster, no other conclusion could be drawn from a reading of the agreed stipulation of facts than that (R. 46)

> "The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, *not generally*, but in doing *this particular work*. During the course of this litigation defendant's chief emphasis was placed upon the alleged local character of the work by an independent contractor not itself engaged in interstate commerce, with subordinate emphasis placed upon the fact that work

on the abutments was new construction. To the contrary, plaintiffs' emphasis was placed upon the claim that the entire work was a repair job to an interstate transportation system irrespective of the fact that the work was undertaken by an independent contractor. I do not find that lack of information concerning the hourly or daily activities of each employee was made a point of attack until the decision of the United States Supreme Court came down, and I think that both parties assumed the construction of the conceded facts which I have indicated. But in any event the conceded facts, *in my judgment, embrace no activities not essential to the main work of repair* (*Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made." (Italics ours.)

The duties of the plaintiffs, if explained minutely and in detail, would all be summed up to the work of repair of interstate bridges. The petitioner herein knew this when the stipulation was drawn. It knows it now. That is why it has continuously since the decision of this Court, insisted before all of the state courts that no new trial should be had. That is why throughout the years it has been continuously by changing and contradictory arguments and by resorting to technicalities sought to avoid compliance with this important federal statute.

The only issue determined by the state courts, and the only issue presented to this Court, is one of civil procedure. The petitioner herein could easily have required of the plaintiff proof of the details of each workers' duties, by merely interposing on the motion for summary judgment a short answering affidavit. The failure to file any answering affidavit whatsoever resulted, as Judge Loughran stated, in (R. 64): "No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of

the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable."

The purpose of a motion for summary judgment is to avoid trials where no issue exists. In cases where there is an issue, the defendant must so assert by affidavit. When an issue appears, summary judgment cannot be granted. But here the petitioner failed to submit to the Court any issue to be tried by its failure to interpose any answering affidavit.

On page 8 of the petitioner's brief it is argued if such decision (referring to the decision of the Court of Appeals, 293 N. Y. 126, R. 63) is not corrected, it will create uncertainty with respect to the coverage of the Fair Labor Standards Act in that large field of employment consisting of employment in work related to the repair, etc. * * * on railroad bridges, rights of way, public highways, streets and bridges, air fields, telephone transmission lines, gas mains, water mains and electric transmission lines, to mention only some of the employment fields affected. The decision of the United States Supreme Court (318 U. S. 740) and the decision of the Court of Appeals (R. 63, 293 N. Y. 126) apply only to the repair of bridges carrying the tracks of an interstate railroad previously dedicated to commerce. In all of the courts of the State of New York petitioner has cited many federal cases which held that work in connection with railroads, transmission lines, etc., which are engaged in both interstate and intrastate commerce have at times been held to be work not so closely connected with commerce as to be in legal contemplation a part of it, but petitioner has never cited before these courts, nor does it cite in this court, any authority which holds that men engaged in the repair of interstate railroad bridges previously dedicated to commerce are not engaged in commerce. In fact, the work of Pedersen in *Pedersen v. Delaware, Lackawanna &*

Western Railroad Co. (229 U. S. 146), who was carrying bolts to be delivered to another man, who in turn would use them in the repair of a bridge, was engaged in about the most remote duty that it is possible to imagine in connection with the repair of bridges.

The agreed stipulation of facts can be read no other way than that the plaintiffs were engaged in the repair of an interstate railroad bridge previously dedicated to commerce, and regardless of the minuteness of the details of their work they are obviously, under the decision of this Court, engaged in interstate commerce and entitled to the benefits of the Fair Labor Standards Act.

On page 12 of the petitioner's brief a quotation is made from Mr. Justice Schenck's decision in the Appellate Division, in which Mr. Justice Schenck refers to four different plaintiffs, A, B, C and D. Justice Schenck concedes that the cases of A and C would be covered by the Act. The case of B (*Erie R. R. Co. v. Szary*, 253 U. S. 86, as overruled in *Chicago & Eastern Ill. R. R. Co. v. Ind. Comm.*, 288 U. S. 296) is clearly distinguishable, for there this Court held that persons engaged in furnishing sand or water to locomotives, there being no proof whatsoever as to whether the locomotives were to be used in either interstate or intrastate commerce, are not necessarily engaged in commerce. This, of course, is obvious. But no court has held that the carrying of sand or water for the repair of an existing interstate railroad bridge previously dedicated to commerce would not be engaged in interstate commerce, nor do we think that any such court will ever so hold. And in the case of D, the only remaining one, this Court pointed to the distinction by citing in its opinion the case at bar, stating:

> "So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads (*Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U. S. 740)."

There being no issue therefore which this Court has not previously decided, and the state courts having held that under the procedure followed and the statutes of the State of New York covering the rules of civil procedure, no other possible judgment could be rendered, there exists no reason for the issuance of the writ.

POINT II.

The award of interest on the judgment was proper.

The only other question raised is the question of whether or not interest on the award of damages should have been allowed. Since this Court has already issued a petition for a writ of certiorari in *Greenberg v. Arsenal Building Corporation, et al.* (.....F. [2d].....) decided July 18, 1944, and since this question will be decided by the decision of this Court in that case, there is no possible public reason for repeating its decision in this case. The respondent herein will abide by the decision of this Court in the *Greenberg* case (*supra*), so far as the question of the interest upon the awarding of interest is concerned.

The respondents, however, contend that they are entitled to interest. The liability for liquidated damages under the Federal Fair Labor Standards Act is contractual in character. (*Overnight Motor Co. v. Missell*, 316 N. Y. 572, 583; *Northwestern Yeast Co. v. Brouthe*, 133 F. 2d 628; see too, *Cox v. Lykes Brothers*, 237 N. Y. 376; *Wright v. State of New York*, 223 N. Y. 44; *Calvin v. Huntley*, 178 Mass. 29.)

Section 480 of the Civil Practice Act reads as follows:

"* * * In every action now pending or hereafter brought wherein any sum of money shall be awarded

by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded."

"This section is a mandatory direction to the court to include in every verdict on a contract action the interest thereon, whether the demand was liquidated or unliquidated." *McLaughlin v. Brinkerhoff* (222 App. Div. N. Y. 458).

In actions for breach of contract the interest runs from the date of the breach (*Greater New York v. Philadelphia and Reading*, 252 App. Div. N. Y. 883).

While in other cases it is held that interest should be computed from the date of the commencement of the action (*Morgan Lake Co. v. New York, N. H. & H. R. R. Co.*, 262 N. Y. 234).

See also *Sweeney v. City of New York* (173 N. Y. 414), wherein the Court reviews the question of adding interest to the amount of judgment on a date from which the interest should run. The Court said, quoting from Judge Earl in *White v. Miller* (78 N. Y. 393):

"Where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that, if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date."

In the case at bar the amount the plaintiffs had due them was known, ascertainable, agreed and stipulated upon between the parties to be a certain amount of money at the date the action was commenced. They are, therefore, entitled to interest under the same for howsoever long the defendant is in default in making payment.

In *Quinn v. Sigretto* (229 App. Div. N. Y. 727) the Court held that the plaintiff was entitled under this section to have interest added to the verdict and included in the judgment even though not demanded in the complaint or proved on the trial.

In *Freedman v. Hart & E. Co.* (162 Misc. N. Y. 487) the Court held that the date of institution of action is the fairest point to start the running of interest.

Even before the enactment of Section 480 of the Civil Practice Act of the State of New York, the question of whether or not a judgment carried with it interest was determined by whether or not at the time the action was commenced the defendant knew or was able to ascertain the exact amount of money owed the plaintiff. In the present case the amount due to the plaintiff was known and ascertainable at the time that the summons and complaint were served. In fact, in the agreed stipulation of facts the amount of money due each plaintiff was agreed upon by the parties and fixed at a definite sum down to the last penny. That amount of money was due each of the plaintiffs in 1939 and it has been due to the delay of the defendant that the same has not been paid.

The Courts have repeatedly held that the additional equal amount of damages that the defendant who fails to pay his workers under the Fair Labor Standards Act is required to pay is not a penalty, but is in the form of liquidated damages, and is additional compensation to the employees for the illegal deprivation of such compensation, and is due them immediately upon the violation of the statute. See *Maddox v. Jones* (42 F. Supp. 35). *La Guardian v. Austin-Bliss General Tire Co.* (41 F. Supp. 678), *Hargrave v. Mid-Continent Petroleum Corporation* (36 F. Supp. 233), *Robertson v. Argus Hosiery Mills* (32 F. Supp. 19).

Since the amounts due these men are in the form of liquidated damages, the amounts of which are easily ascertainable, and since it was due at the time of the commencement of the action, there can be no doubt that interest thereon should be paid to them, just as interest was paid to the employees in a similar case under the same statute in *Sneider v. Sports Vogue* (35 N. Y. S. 2nd 341).

Chief Justice Hughes of the United States Supreme Court, speaking on the subject of interest in the case of *Funkhouser v. J. B. Preston Co.* (290 U. S. 167), said:

> "The statutory allowance is for the purpose of securing a more adequate compensation by adding an amount commonly viewed as a reasonable measure of the loss sustained through delay in payment. It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution (*Faber v. New York*, 222 N. Y. 255), and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality."

In another part of the same decision Justice Hughes said:

> "Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should

the defendant have paid it? Could the latter have determined what was due, either by computations alone or by computation in connection with established market values or other generally recognized standards."

"A debtor has no substantial right to avoid the payment of interest in full." *Preston Co. v. Funkhouser* (261 N. Y. 140.)

The fact that this action was brought under a federal statute in no way changes the circumstances. In *Schumacker v. Leterman, et al.* (14 Fed. Supp. 1015) it is clearly pointed out that in the Federal Courts the question of whether or not interest is added to the judgment depends upon the law of the state in which the district court is located. In that case the Court stated:

"Interest runs on judgments of the district court where by law of the state where such court is held, interest runs on judgments of the state courts. Revised Statutes, Section 966 (28 U. S. C. A., Sec. 811). Since the New York Law is that judgments carry interest (Civil Practice Act, Section 481), this judgment should carry interest."

In *Klausner v. Queens Fur Dressing Co., Inc.* (130 Misc. N. Y. 579), the Court said:

"The rule may then be somewhat stricter. The distinction has a possible justification in common modes of thought and practice. A bill for services is felt to cast the burden on the debtor either to pay what is demanded, or, if dissatisfied, to state how much is due. A claim for damages is felt to be more appropriately a subject for assessment by the courts or by some form of arbitration. Even in such circumstances, one marks a growing tendency to make interest an incident where it might once have been excluded (*Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388; *Darlington v. Gates Land Co.*, 151 Wis. 461; *General Supply & Const. Co. v. Goelet*, 241 N. Y. 28, 39)."

CONCLUSION.

It is respectfully submitted that this Court should deny the petition for writ of certiorari.

Dated, October 4, 1944.

William F. J. Lomos

Counsel for Respondent,
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IN THE

Supreme Court of the United States

October Term, 1944.

No. 462.

J. F. FITZGERALD CONSTRUCTION COMPANY,

Petitioner,

vs.

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,

Respondent.

Brief on Behalf of Respondent, Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and all Employees of the Defendant Similarly Situated.

WILLIAM E. J. CONNOR,
Counsel for Respondent.

Dated: January 22, 1945.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1945

Subject Index.

	Page
Table of Authorities	1
Prior Opinions	1
Jurisdiction	2
Statement of Facts	2
Argument: Point I	5
Point II	17
Appendix	23

TABLE OF AUTHORITIES.

Cases:

Adler v. Wiener, 197 N. Y. Supp. 599	8
Bernhard v. Rochester German Ins. Co., 79 Conn. 388	21
Calvin v. Huntley, 178 Mass. 29	17
Cherry v. Howell, 40 F. Supp. 597	8
Chicago & Eastern Ill. R. R. Co. v. Ind. Comm., 284 U. S. 296	16
Chicago & Northwestern Railroad Co. v. Bolle, 284 U. S. 74	16
Cox v. Lykes Bros., 237 N. Y. 376	17
Darlington v. Gates Land Co., 151 Wis. 461	21
Dwan v. Massarene, 199 App. Div. N. Y. 872	6, 10
Elting Collector v. North German Lloyd, 287 U. S. 324, 53 S. Ct. 164, 77 L. Ed. 337	9
Ex Parte Peterson, Receiver, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919	9
Faber v. New York, 222 N. Y. 255	20
Freedman v. Hart & E. Co., 162 Misc. N. Y. 487	19
Funkhouser v. J. B. Preston Co., 290 U. S. 167	20
General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133	6, 10
General Supply & Const. Co. v. Goelet, 241 N. Y. 28, 39	22
Greater New York v. Philadelphia & Reading, 252 App. Div. N. Y. 883	18

Page

Hanna v. Mitchell, 202 App. Div. N. Y. 504, aff'd 235 N. Y. 534 6

Hargrave v. Mid-Continent Petroleum Corp., 36 F. Supp. 233 19

Hess & Bro. v. Small, 288 F. 95 ..... 8, 9

Hoff v. St. Paul-Mercury Indemnity Co., 74 F. 2d 689 (C. C. A. 2) 9

Hoof v. John Hunter Corp., 193 N. Y. Supp. 91 7

Klausner v. Queens Fur Dressing Co., Inc., 130 Misc. N. Y. 579 21

LaGuardian v. Austin-Bliss Gen. Tire Co., 41 F. Supp. 678 19

Less v. Grauhard, 205 App. Div. N. Y. 344 9

Maddox v. Jones, 42 F. Supp. 35 19

Maltz v. Daley, 120 Misc. N. Y. 466, 198 N. Y. Supp. 690 9

Maryland Casualty Co. v. Sparks, 76 F. 2nd 929 9

Maslin v. Columbia National Life Insurance Co., 3 F. Supp. 368 ..... 8, 9

Massee & Felton Lumber Co. v. Benenson, 23 F. 2nd 107 ..... 8, 9

McLaughlin v. Brinkerhoff, 222 App. Div. N. Y. 458 18

McLeod v. Threkeld, 319 U. S. 491 17

Morgan Lake Co. v. New York, New Haven & Hartford Railroad Co., 262 N. Y. 234 18

Nathan H. Gordon Corp. v. Gosman, 232 App. Div. N. Y. 280 7

New York, New Haven & Hartford Railroad Co. v. Bezue, 284 U. S. 415 17

Northwestern Yeast Co. v. Proutin, 133 F. 2nd 628 17

Overnight Motor Co. v. Missell, 316 N. Y. 572, 583 17

Overstreet v. North Shore Corp., 318 U. S. 125, 127 11

Pederson v. Delaware, Lackawanna & Western Railroad Company, 229 U. S. 146 ..... 12, 13, 14

Page

Pedersen v. J. F. Fitzgerald Construction Company, 318 U. S. 740, 318 U. S. 742 ..... 5, 13, 17
Peoples Wayne County Bank v. Wolverine Box Co., 250 Mich. 273, 276, 277, 230 N. W. 170, 69 A. L. R. 1024 9
Preston Co. v. Funkhouser, 261 N. Y. 140 21
Quinn v. Sigretto, 229 App. Div. N. Y. 727 18
Robertson v. Argus Hosiery Mills, 32 F. Supp. 19 19
Schumacker v. Leterman, et al., 14 F. Supp. 1015 21
Shanks v. Delaware, Lackawanna & Western Railroad Company, 239 U. S. 556 16
Sneider v. Sports Vogue, 35 N. Y. Supp. 2nd 341 20
Stewart v. Ahrens, 273 N. Y. 591 6
Strasburger v. Rosenheim, 234 App. Div. N. Y. 544 8
Sweeney v. City of New York, 173 N. Y. 414 18
U. S. v. Fiedler, 37 Fed. 2nd 578 ..... 8, 9
White v. Miller, 78 N. Y. 393 18
Wright v. State of New York, 223 N. Y. 44 17
Wrobel v. Call, 142 Misc. N. Y. 610 8

Statutes:

Fair Labor Standards Act of 1938, 29 U. S. Code, Sec. 201, *et seq.* 2, 10, 17, 22
Revised Statutes, Sec. 966 (28 U. S. C. A., Sec. 811) 9, 21
Rule 113, Rules of Civil Practice of the State of New York 2, 4, 6, 7, 24
Section 480, Civil Practice Act of the State of New York 17
Section 481, Civil Practice Act of the State of New York 21

Treatises:

Carmody's New York Practice, p. 2361, Sec. 1074, Vol. 3 7
Wait's New York Practice Simplified (4th ed.), pp. 612, 218, 619, 620 ..... 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

J. F. FITZGERALD CONSTRUCTION COMPANY,

Petitioner,

vs.

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,

Respondent.

Brief on Behalf of Respondent, Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and All Employees of the Defendant Similarly Situated.

Prior Opinions.

The opinion of the Court of Appeals of the State of New York of June 14, 1944 (R. 63-65) is reported in 293 N. Y. 126. The decision of the Appellate Division, Third Department, of the Supreme Court of the State of New York, of November 18, 1943 (R. 51-58) is reported in 266 App. Div. 1032. The opinion of the Supreme Court of the State of New York of May 21, 1943 (R. 42-47) is unreported. The *per curiam* opinions of this Court, of February 8, 1943, and March 8, 1943, respectively, are reported in 318 U. S. 740 and 318 U. S. 742, respectively.

The prior decision (without opinion) of said Court of Appeals (R. 27) is reported at 288 N. Y. 687; the prior

opinion of said Appellate Division (R. 20-22) is reported at 262 App. Div. 665; and the prior opinion of said Supreme Court (R. 12-15) is reported at 173 N. Y. Misc. 188.

Jurisdiction.

The statute involved is the Fair Labor Standards Act of 1938 (29 U. S. Code Sec. 201, *et seq.*), the pertinent provisions of which are set forth in an appendix hereto.

Rule 113 of the Rules of Civil Practice of the State of New York is printed in full in the appendix hereto. Since the very facts upon which this appeal is based was heretofore decided by this Court in this same entitled case at 318 U. S. 740, and since the entry of the judgment was pursuant to Rule 113 of the Rules of Civil Practice of the State of New York, a rule of civil procedure in the State Court, the plaintiffs do not concede the jurisdiction of this Court.

Statement of Facts.

This action was begun in June, 1939, by the service of a verified summons and complaint. In this complaint (R. 4 and 5) the plaintiffs repeatedly alleged that the work they performed was in interstate commerce (see paragraphs of complaint 2, 3, 4, 5 and 7). The action was tried pursuant to an agreed stipulation of facts (R. 9). The pertinent facts are:

In September, 1938, abutments supporting two interstate railroad bridges were washed out and the substructures of two other interstate bridges were damaged by flood. Thereafter the railroad company entered into a contract with the defendant * * * for the construction of entirely new abutments under the two bridges

where the abutments had been washed out and for repairing the substructures of the other two bridges which had been damaged. The defendant* employed the plaintiffs * * * as its employees in doing work under a contract. The contract, the work of which the plaintiffs* performed, was two-thirds the construction of new abutments and the remainder the repair of the substructures of the other two bridges.

The Trial Justices dismissed the complaint (R. 18). The dismissal of the complaint was by a divided vote upheld by the Appellate Division of the Supreme Court of the State of New York, three judges voting to affirm and two judges voting to reverse. Upon appeal to the Court of Appeals of the State of New York the dismissal of the complaint was unanimously affirmed without opinion. Thereafter this Court granted a writ of certiorari, reversed the decisions of the State Court with costs and remanded the case to the Supreme Court of the State of New York for further proceedings not inconsistent with the opinion of this Court (R. 29-31).

The defendant, feeling aggrieved by the decision of this Court, again applied to this Court for a rehearing or re-argument and this application was denied (R. 32-34). The Court, however, modified its original decision as follows: "and without prejudice to a determination of the nature of the employment of any of the members of the class on whose behalf this suit has been brought."

On May 3rd, 1943, the defendant again moved in the Supreme Court of the State of New York for a dismissal of the complaint on no papers whatsoever except those found at R. 34 which is merely a motion to dismiss the

*Because of the many appeals in this case and the fact that the plaintiffs and defendant have interchangeably been respondent and appellant, for the purpose of this brief, the J. F. Fitzgerald Construction Company will always be referred to as the defendant; and Chris Pedersen, et al., will always be referred to as plaintiffs.

complaint. No proceedings whatsoever of any kind intervened between the decision of this Court and the defendant's motion to dismiss the complaint except the entry of the bill of costs of the plaintiffs (R. 32-34, inc.).

After defendant's motion to dismiss the complaint was served, the plaintiff moved before the same Court returnable the same day, for a motion for summary judgment pursuant to the provisions of Rule 113 of the Rules of Civil Practice of the State of New York. *The defendant did not in any way resist this motion by interposing any answering affidavits of any kind showing to the Court that there was any issue of any kind to be tried.*

The Supreme Court of the State of New York denied defendant's motion to dismiss the complaint (R. 34) and granted the motion for summary judgment (R. 41).

From these decisions the defendant appealed to the Appellate Division of the State of New York which in all respects sustained the lower Court. From the decision of the Appellate Division the defendant appealed to the Court of Appeals of the State of New York, which in all respects sustained the Appellate Division.

The defendant then applied to this Court for a writ of certiorari upon two grounds: (1) whether the entry of judgment for the plaintiffs by the Supreme Court of New York is in conflict with the decision of this Court and constitutes a violation of the prior mandate of this Court; and (2) whether interest may be added to the damages.

This Court granted the writ of certiorari limited to the second point.

The defendants then applied to the Court of Appeals of the State of New York in an application to modify the provisions of the remittitur of the Court of Appeals asking that the remittitur be modified as follows:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a *prima facie* case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

The Court modified the order of remittitur exactly as requested by the defendant. The defendant then filed a petition for rehearing to remove the limitations imposed by the order of November 6, 1944, and this Court *ex parte* lifted those limitations and granted the writ of certiorari which is now before the Court.

ARGUMENT.

POINT I.

The only federal question before this Court having heretofore been decided by this Court, and the plaintiff having established a *prima facie* case and the defendant having failed to avail itself of the modification of the decision of this Court, the judgment appealed from should be sustained.

This appeal involves the same judicial determination as that which was heretofore before this Court (*Pedersen v. Fitzgerald Construction Co.*, 318 U. S. 740 and 318 U. S. 742). That certiorari was from the Supreme Court of the State of New York which dismissed the com-

plaint. This Court reversed and remanded the case to the State Court for further proceedings in conformity with the judgment and decree of this Court. This appeal is also from an order of the same State Court denying a motion to dismiss the complaint. It would, therefore, seem obvious that so far as this appeal is from the denial of the motion to dismiss the complaint, the doctrine of *res judicata* must apply.

But this appeal is also from an order granting a motion for summary judgment. When it became obvious that the defendant did not intend or was unable to avail itself of the modification of the reversal by this Court which provided that the reversal was "without prejudice to a determination of the nature of the employment of any of the members of the class on whose behalf this suit has been brought," the plaintiffs moved before the same Court and at the same time as the motion to dismiss the complaint was returnable, for summary judgment pursuant to Rule 113 of the Rules of Civil Practice of the State of New York. This motion was made upon the affidavit of William E. J. Connor, the record on appeal, the decision of this Court, and upon all other papers and proceedings heretofore had.

Rule 113 of the Rules of Civil Practice, which is printed in full in the appendix, provides in short that either party to an action may move for judgment before trial, and that judgment must be granted "unless the other party by *affidavit* or other proof shall show such facts as may be deemed by the Judge hearing the motion sufficient to entitle him to a trial of the issues." This section has repeatedly been held to be constitutional. *Stewart v. Ahrens* (273 N. Y. 591); *Hanna v. Mitchell* (202 App. Div. N. Y. 504; affd. 235 N. Y. 534); *Dwan v. Massarene* (199 App. Div. N. Y. 872); *General Investment Co. v. Interborough R. T. Co.* (235 N. Y. 133).

Notwithstanding anything contained in opponent's brief, it is the well established law of the State of New York that in order to defeat a motion for summary judgment under Rule 113 the opposing party *must* submit proof by affidavit or otherwise that there is an issue to be tried. In fact the language of Rule 113 itself so provides as will be noted from the quoted portion, *supra*. Professor Carmody in his treatise on the New York Civil Practice says at page 2361, section 1074, volume 3, Carmody's New York Practice:

> "* * * and the defendant *must* substantiate the ultimate facts stated in his answer by affidavit." (Italics ours.)

Wait's New York Practice Simplified, Fourth Edition, Volume 3, at page 612 states:

> "This does not mean, however, that the application will be denied because the pleadings themselves raise an issue. It is obvious under the rule that facts *must be presented by affidavits showing that there is an issue.*" (Italics ours.)

And the following cases have held that the answer itself is not an affidavit within the meaning of the rule: *Hoof v. John Hunter Corp.*, 193 N. Y. S. 91; *Nathan H. Gordon Corp. v. Cosman*, 232 App. Div. N. Y. 280.

We quote again from Wait's New York Practice, page 618:

> "Where the moving papers are *prima facie* sufficient, however, the defendant must meet them by affidavits setting forth such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff.
>
> "These affidavits *must* indicate that there is a *bona fide* issue and not merely that the defendant is taking advantage of some technicality of plead-

> ing. *Wrobel v. Call*, 142 Misc. N. Y. 610; 255 Supp. 258. There *must* be real and substantial facts shown *in the affidavit* sufficient to entitle the defendant to defend. *Strasburger v. Rosenheim*, 234 App. Div. N. Y. 544." (Italics ours.)

And again at page 619 of Wait's New York Practice, we quote:

> "In short, the motion is not based upon the pleadings as such, but rather upon the evidentiary facts *contained in the affidavits.*"

And at page 620 of Wait's New York Practice, we quote:

> "The truth or falsity of the allegations in the affidavits cannot, of course, be determined on a motion under Rule 113. The sole question presented is whether the affidavits raise an issue of fact sufficient to entitle the defendant to a trial of the issues. *Adler v. Wiener*, 197 N. Y. S. 599."

In determining procedure in law actions the construction of state laws by the State Courts is binding on the Federal Courts. *Cherry v. Howell* (40 F. Supp. 597).

Rule 113 of the Rules of Civil Practice has been used repeatedly in proceedings in the Federal Courts, and the Federal Courts have always given it the same judicial interpretation as that given to it by the State Courts as shown above. *Maslin v. Columbian National Life Insurance Co.* (3 F. Supp. 368); *Hess & Bro. v. Small* (288 F. 95); *Massee & Felton Lumber Co. v. Benenson* (23 F. [2d] 107).

In the case of *United States v. Fiedler*, 37 Fed. (2d) 578, the Court said:

> "The defendants filed no affidavit in support of, or in amplification of their answer. In the circumstances, is the answer sufficient? * * * No such allegation is made, and the absence of a support-

ing affidavit raises the presumption that the defense is not offered in good faith, and that it could not be sustained. *S. M. Hess & Bro. v. Small* (D. C.), 288 F. 995; *Maltz v. Daly*, 120 Misc. Rep. 466, 198 N. Y. S. 690."

Again in the case of *Maryland Casualty Co. v. Sparks*, 76 F. (2d) 929, the Court said:

> "We come then to the attack upon the summary judgments as such. A speedy method of obtaining judgment upon contracts or judgments where no valid defense is interposed has been employed in Michigan for almost 100 years. If there are issues of fact the motion for summary judgment is denied, and the issues are left for a jury to determine. If there are no questions of fact the judge applies the law in accordance with the admitted facts as disclosed by the affidavits. *Peoples Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 276, 277, 230 N. W. 170, 69 A. L. R. 1024. It has never been doubted that local statutes and rules for the granting of summary judgments are binding upon the federal courts by virtue of the Conformity Act (28 U. S. C. A., Sec. 724). *Massee & Felton Lumber Co. v. Benenson*, 23 F. (2d) 107 (D. C. N. Y.); *United States v. Fiedler*, 37 F. (2d) 578 (D. C. N. Y.); *Maslin v. Columbian National Life Ins. Co.*, 3 F. Supp. 368 (D. C. N. Y.); *Elting, Collector, v. North German Lloyd*, 287 U. S. 324, 53 S. Ct. 164, 77 L. Ed. 337; *Hoff v. St. Paul-Mercury Indemnity Co.*, 74 F. (2d) 689 (C. C. A. 2). Summary judgment statutes do not deprive defendants of the right to trial by jury if the affidavits present no question of fact. *Ex Parte Peterson, Receiver*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919."

In *Less v. Grauhard*, 205 App. Div. N. Y. 344, at page 346, the Court said:

> "Moreover, we are of the opinion that the denials contained in the defendant's answer were insufficient to raise issues or to defeat the plaintiff's motion. The futility of such denials in opposition

to a motion to strike out an answer under rule 113 was considered in *Dwan v. Massarene* (199 App. Div. 872), and this Court there said that: 'The defendant must show that he has a *bona fide* defense to the action, one which he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. *This he must show by affidavits or other proof.* He cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. *He must show* that his denial or his defense is not false and sham, but interposed in good faith and not for delay. If he shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend, this court will not review the order, as we consider that no substantial right of the plaintiff has been violated.'

"The answer in the present case contains nothing but specific denials. *No affidavit* is filed by the defendant in opposition to plaintiff's motion, the defendant relying upon the pleadings. Defendant's answer was insufficient to show that he has a *bona fide* defense to the present action. As was said in *Dwan v. Massarene* (*supra*): 'He cannot shelter himself behind general or specific denials.'

"In *General Investment Co. v. Interborough R. T. Co.* (225 N. Y. 133) the constitutionality of rule 113 was passed upon and sustained by the Court of Appeals." (Italics ours.)

In fact this was particularly pointed out by the Court of Appeals in the case at bar by Judge Loughran in the opinion wherein it was stated:

> "On the record as it stood, summary judgment for the plaintiffs was inevitable" (R. 64).

The record on appeal completely established a *prima facie* case under the Fair Labor Standards Act of 1938 (29 U. S. Code, Sec. 201, *et seq.*). The complaint alleges that the plaintiffs were engaged in interstate work for the defendant, that they worked in excess of the number

of hours permitted by the statute and were not paid the amounts required by the statute. The agreed statement of facts conclusively shows that the plaintiffs were engaged in interstate commerce, worked in excess of the number of hours permitted, without being paid the amounts required by the statute. A comprehensive reading of the agreed statement of facts will disclose that the intention of the parties was to agree upon the following facts:

1. The Boston & Albany Railroad is an interstate railroad.

2. Four bridges on this railroad were damaged by flood.

3. The bridges carried the tracks of this interstate railroad.

4. The defendant made a contract to repair these four bridges.

5. This contract provided for nothing whatsoever except the repair of these four interstate railroad bridges.

6. The work provided in this contract was as follows: Two-thirds of the total work performed was the construction of new abutments and the remainder the repairs to the substructures of the other two bridges.

7. The plaintiffs performed this work under this contract.

It was, therefore, agreed by the parties that the specific work of these plaintiffs was the rebuilding of abutments under two bridges of an interstate railroad and repairing the substructures of two other bridges of the same interstate railroad.

According to the decision of this Court in *Overstreet vs. North Shore Corporation* (318 U. S. 125, 127), the complaint alleged that "Brazle was engaged in mainte-

nance and repair work on the road and bridge." This Court held that such description of the nature of Brazle's duties sufficiently stated a cause of action and that the complaint should not be dismissed. If an allegation of this nature is sufficient to sustain a complaint, the uncontradicted proof should be sufficient to support a judgment.

Mr. Justice Foster of the Supreme Court analyzed this agreed statement of facts as follows:

> "The fair import of these conceded facts is that the defendant was engaged in certain work and the plaintiff and his associates were its employees, not generally, but in doing *this particular work* * * * but in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (*Pedersen vs. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made."

If any of these plaintiffs was engaged in work not a part of interstate commerce, it must of necessity have been work other than that of repair of substructures or the rebuilding of abutments of interstate railroad bridges. And under such circumstances the defendant should have excluded these plaintiffs from its stipulation.

When this agreed statement of facts was drawn it must be remembered that the stipulation applied to the work of forty plaintiffs. It is obvious that in the repair of a bridge where a portion of the work was the construction of new abutments and the other portion was the repair of substructures, that there are many different types of work to be done, even though all of them are repair work. It, therefore, became necessary in describing the nature of the work performed by these forty

plaintiffs, to make a broad stipulation of the nature of their duties and still have that stipulation show that their work was in connection with the repair of the substructures and the construction of abutments on interstate railroad bridges. We believe that a comprehensive reading of the agreed statement of facts will show that this is exactly what was agreed. Moreover, since the contract between the Fitzgerald Construction Company and the Boston & Albany Railroad Company was a contract for the repair of an instrumentality of commerce, and since nothing whatsoever was in this contract except this particular work, it necessarily follows that everyone engaged in the performance of that contract was engaged in interstate commerce.

It may well be that the Fitzgerald Construction Company had employees who were at work in other places, on other jobs and on matters not connected with *this contract,* but all who were engaged in the performance of *this contract* in any capacity were engaged in interstate commerce or in work so closely connected with interstate commerce as to be, in legal contemplation, a part of it. The defendant was at liberty at any time before entering into the stipulation to have excepted from the stipulation any or all of the plaintiffs, but it elected to include all plaintiffs. By so doing it stipulated that all plaintiffs were engaged in commerce according to the decision of this Court in the case at bar (*Pedersen v. Fitzgerald Construction Co.,* 318 U. S. 742). Our contention that all men engaged in the performance of this contract were engaged in commerce is supported by the decision of this Court in *Pedersen v. Delaware, Lackawanna & Western Railroad* (229 U. S. 146). In the *Pedersen v. Delaware, Lackawanna & Western Railroad* case it was contended that at the time of his injuries Pedersen was not engaged in removing the old girder and inserting a new one, but was "merely carrying to the

place where the work was to be done some of the material to be used." The Court said:

> "We think there is no merit in this. It was necessary to the repair of the bridge that the material be at hand and the act of taking them there was a part of that work. In other words it was a minor task which was essentially a part of the larger one as is the case where the engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

In other words the Court pointed out that every task regardless of how minor it may be, if it be a part of the repair of an interstate railroad bridge, is a part of commerce. It is difficult to assume any detail more minor in the repair of a bridge than the work which Pedersen was performing in the *Pedersen v. Delaware, Lackawanna & Western Railroad* case.

The modification of this Court's decision which was obtained entirely *ex parte,* has always been considered by the plaintiffs as merely a concession to the defendant wherein it was granted an opportunity (notwithstanding its defeat in this court) to submit proof, if the same were available to them, that some of the members of the class on whose behalf this action had been brought, were not actually engaged in repair work, but were in fact engaged in duties not connected with interstate commerce.

Mr. Justice Foster interpreted the modification thus:

> "Nor do I regard the modification by the Supreme Court of its original mandate as of vital significance insofar as the foregoing conclusions are concerned. Such modification was granted after a petition by the defendant for a rehearing. It was no more a direction to the plaintiff than it was permission to the defendant to re-open the matter, if either so desired, and could so do under

> our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates. A new trial was not directed, and in no sense do I regard the modification as a finding that the agreed facts were insufficient upon which to base a judgment."

To establish its contention the defendant herein has submitted to this Court a number of cases, most of them railroad cases which have held at one time or another, that men employed upon a railroad which is both interstate and intrastate railroad, are at times engaged in intrastate work, and have sought to apply those cases to the case at bar. The cases submitted, as will hereinafter be shown, are not controlling. The fallacy of its argument is obvious. It is apparent that upon a railroad doing both interstate and intrastate work that at times men are employed upon instrumentalities which are not at the times instrumentalities of commerce. Defendant therefore in the preparation of its brief has analyzed a great number of cases, and whenever it has found a case of a man using a hammer, wheeling a wheelbarrow, mixing gravel, or doing any of the hundreds of different types of manual labor, and the Court has held that he was not engaged in commerce, it has then cited this case as an authority for the case at bar. The fact is that in each case cited the specific work being performed was being done by a workman at a time when he was working upon an instrumentality either never a part of commerce or one that has been withdrawn from commerce.

We call the Court's specific attention to the fact that in all cases submitted by the defendant in its brief before this Court, the defendant has failed to submit one single case of a workman engaged in any capacity whatsoever upon a railroad bridge. The plaintiff will now endeavor to demonstrate to the Court that the cases sub-

mitted by the defendant before this Court are neither pertinent nor controlling.

In the case of *Shanks v. Delaware, Lackawanna & Western Railroad Co.* (239 U. S. 556), the Court pointed to the distinction itself by stating at page 560:

> "Shanks was not employed in interstate transportation or in repairing or keeping in usable condition a roadbed, *bridge*, engine, or car or other instrument then in use in such transportation." (Italics ours.)

In the case of *Chicago & Northwestern Railroad Co. v. Bolle* (284 U. S. 74), this Court again pointed to the distinction when it said, at page 77:

> "But his employment at the time of the injury was confined to firing the stationary or locomotive engine for the sole purpose of producing steam. The character of the work which he did at other times becomes immaterial."

In the case of *Chicago & Eastern Ill. Railroad Co. v. Ind. Comm.* (284 U. S. 296), the Court held that persons engaged in furnishing sand or water to locomotives where there is *no proof* as to whether the locomotives are to be used in either interstate or intrastate commerce have not established the burden of showing they were engaged in interstate commerce. This case is in no way pertinent, for it is the contention of the plaintiffs that if the plaintiffs were delivering sand or water for the repair of an interstate railroad bridge used in interstate commerce, that they would be engaged in interstate commerce, and the *Chicago & Eastern Ill. Railroad Co. v. Ind. Comm.* case does not hold otherwise. The reason for the decision of this Court in the *Chicago & Eastern Ill. Railroad Co.* case was obviously because there was a failure of proof that the sand and water was to be used upon an instrumentality of commerce.

In the case of *New York, New Haven and Hartford Railroad Co. v. Bezue* (284 U. S. 415) the particular services performed by Bezue was the repair of a locomotive which had been withdrawn from transportation so that the instrumentality itself was not in interstate commerce.

The case of *McLeod v. Threkeld* (319 U. S. 491) was the case of an independent contractor operating a restaurant and furnishing food to employees of a railroad, the employees paying for the food themselves, and this Court again pointed to the distinction by referring to the very case at bar in the following language:

> "So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads (*Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U. S. 740)."

POINT II.

It was proper to add interest to the award.

The liability for liquidated damages under the Federal Fair Labor Standards Act is contractual in character (*Overnight Motor Co. v. Missell*, 316 N. Y. 572, 583; *Northwestern Yeast Co. v. Broutin*, 133 F. 2d 628; see, too, *Cox v. Lykes Brothers*, 237 N. Y. 376; *Wright v. State of New York*, 223 N. Y. 44; *Calvin v. Huntley*, 178 Mass. 29).

Section 480 of the Civil Practice Act reads as follows:

> "* * * In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, other than a contract to marry, interest shall be recovered upon the principal sum whether thereto-

fore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded."

"This section is a mandatory direction to the court to include in every verdict on a contract action the interest thereon, whether the demand was liquidated or unliquidated." *McLaughlin v. Brinkerhoff* (222 App. Div. N. Y. 458).

In actions for breach of contract the interest runs from the date of the breach (*Greater New York v. Philadelphia and Reading*, 252 App. Div. N. Y. 883).

While in other cases it is held that interest should be computed from the date of the commencement of the action (*Morgan Lake Co. v. New York, N. H. & H. R. R. Co.*, 262 N. Y. 234).

See also *Sweeney v. City of New York* (173 N. Y. 414), wherein the Court reviews the question of adding interest to the amount of judgment on a date from which the interest should run. The Court said, quoting from Judge Earl in *White v. Miller* (78 N. Y. 393):

"Where an account for services, or for goods sold and delivered, which has become due and is payable in money, although not strictly liquidated, is presented to the debtor and payment demanded, the debtor is put in default and interest is set running; and that, if not demanded before, the commencement of suit is a sufficient demand to set the interest running from that date."

In the case at bar the amount the plaintiffs had due them was known, ascertainable, agreed and stipulated upon between the parties to be a certain amount of money at the date the action was commenced. They are, therefore, entitled to interest under the same for howsoever long the defendant is in default in making payment.

In *Quinn v. Sigretto* (229 App. Div. N. Y. 727) the Court held that the plaintiff was entitled under this section

to have interest added to the verdict and included in the judgment even though not demanded in the complaint or proved on the trial.

In *Freedman v. Hart & E. Co.* (162 Misc. N. Y. 487) the Court held that the date of institution of action is the fairest point to start the running of interest.

Even before the enactment of Section 480 of the Civil Practice Act of the State of New York, the question of whether or not a judgment carried with it interest was determined by whether or not at the time the action was commenced the defendant knew or was able to ascertain the exact amount of money owed the plaintiff. In the present case the amount due to the plaintiff was known and ascertainable at the time that the summons and complaint were served. In fact, in the agreed stipulation of facts the amount of money due each plaintiff was agreed upon by the parties and fixed at a definite sum down to the last penny. That amount of money was due each of the plaintiffs in 1939 and it has been due to the delay of the defendant that the same has not been paid.

The Courts have repeatedly held that the additional equal amount of damages that the defendant who fails to pay his workers under the Fair Labor Standards Act is required to pay, is not a penalty, but is in the form of liquidated damages, and is additional compensation to the employees for the illegal deprivation of such compensation, and is due them immediately upon the violation of the statute. See *Maddox v. Jones* (42 F. Supp. 35), *La Guardian v. Austin-Bliss General Tire Co.* (41 F. Supp. 678), *Hargrave v. Mid-Continent Petroleum Corporation* (36 F. Supp. 233), *Robertson v. Argus Hosiery Mills* (32 F. Supp. 19).

Since the amounts due these men are in the form of liquidated damages, the amounts of which are easily ascer-

tainable, and since it was due at the time of the commencement of the action, there can be no doubt that interest thereon should be paid to them, just as interest was paid to the employees in a similar case under the same statute in *Sneider v. Sports Vogue* (35 N. Y. S. 2nd 341).

Chief Justice Hughes of the United States Supreme Court, speaking on the subject of interest in the case of *Funkhouser v. J. B. Preston Co.* (290 U. S. 167), said:

> "The statutory allowance is for the purpose of securing a more adequate compensation by adding an amount commonly viewed as a reasonable measure of the loss sustained through delay in payment. It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated claims has been in evolution (*Faber v. New York*, 222 N. Y. 255), and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality."

In another part of the same decision Justice Hughes said:

> "Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty, as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computa-

tions alone or by computation in connection with established market values or other generally recognized standards."

"A debtor has no substantial right to avoid the payment of interest in full." *Preston Co. v. Funkhouser* (261 N. Y. 140.)

The fact that this action was brought under a federal statute in no way changes the circumstances. In *Schumacker v. Leterman, et al.* (14 Fed. Supp. 1015) it is clearly pointed out that in the Federal Courts the question of whether or not interest is added to the judgment depends upon the law of the state in which the District Court is located. In that case the Court stated:

"Interest runs on judgments of the district court where by law of the state where such court is held interest runs on judgments of the state courts. Revised Statutes, Section 966 (28 U. S. C. A., Sec. 811). Since the New York Law is that judgments carry interest (Civil Practice Act, Section 481), this judgment should carry interest."

In *Klausner v. Queens Fur Dressing Co., Inc.* (130 Misc. N. Y. 579), the Court said:

"The rule may then be somewhat stricter. The distinction has a possible justification in common modes of thought and practice. A bill for services is felt to cast the burden on the debtor either to pay what is demanded, or, if dissatisfied, to state how much is due. A claim for damages is felt to be more appropriately a subject for assessment by the courts or by some form of arbitration. Even in such circumstances, one marks a growing tendency to make interest an incident where it might once have been excluded (*Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388; *Darlington v. Gates Land*

Co., 151 Wis. 461; *General Supply & Const. Co. v. Goelet*, 241 N. Y. 28, 39)."

Respectfully submitted,

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Office & Post Office Address,
609 Warren Street,
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Dated: January 22, 1945.

APPENDIX A.

Fair Labor Standards Act of 1938 (29 U. S. Code, Sections 201, *et seq.*).

Sec. 3 (b) "'Commerce' means trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof" (Sec. 203 [b]).

Sec. 7 (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 207 [a]).

Sec. 16 (b) "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" (Sec. 216 [b]).

APPENDIX B.

Rule 113 of Rules of Civil Practice of the State of New York.

RULE 113. SUMMARY JUDGMENT.

When an answer is served in an action.

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such

evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in Subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the Court alone, or by the Court and jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in Subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the Court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established prima facie by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The Court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (Am. March 14, 1932; June 15, 1933; cf. L. 1936, ch. 763, in effect Sept. 1.)

FILE COPY

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

ORDER OF NEW YORK COURT OF APPEALS TO RESPONDENT TO SHOW CAUSE WHY ITS REMITTITUR SHOULD NOT BE AMENDED

HENRY E. FOLEY,
Counsel for Petitioner

GEORGE H. DEAN CO., PRINTERS, BOSTON

In the Court of Appeals of the State of New York

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

—against—

J. F. FITZGERALD CONSTRUCTION COMPANY,
Appellant.

Upon the annexed affidavit of Charles E. Nichols, the record on appeal herein, the remittitur of this Court herein dated June 14, 1944, and upon all papers and proceedings herein, and on motion of Whalen, McNamee, Creble & Nichols, attorneys for the appellant, it is

ORDERED, that the above named respondent show cause before this Court at its court room in the Court of Appeals Hall in the City of Albany, New York on November 20, 1944, at 2:00 P. M. why this Court should not make an order herein requesting a return of the remittitur herein to said Court, and that said remittitur be amended by including therein and adding thereto at the end of the third paragraph thereof the following:

"Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts

states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant acquired the burden, which it failed to sustain, of establishing the nature of the employment of the individual respondents."

and why this Court should not grant such other, further and different relief in the premises as may be proper.

Service of a copy of this order together with a copy of the annexed affidavit, either personally or by mail, upon respondent's attorneys on or before November 14, 1944, shall be deemed sufficient.

Dated: November 13, 1944.

IRVING LEHMAN,
Chief Judge

In the Court of Appeals of the State of New York

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

—against—

J. F. FITZGERALD CONSTRUCTION COMPANY,

Appellant.

AFFIDAVIT OF CHARLES E. NICHOLS, ESQ. IN SUPPORT OF MOTION TO AMEND REMITTITUR

STATE OF NEW YORK
COUNTY OF ALBANY } ss.:

Charles E. Nichols, being duly sworn, deposes and says:

I am a member of the firm of Whalen, McNamee, Creble and Nichols, attorneys for the defendant-appellant herein, and I am familiar with all proceedings in the above-entitled action.

This affidavit is submitted in support of the application of the defendant-appellant for an order amending the remittitur herein by including therein or adding thereto, at the end of the third paragraph thereof, a statement indicating that the federal question raised by the appellant in this Court was decided by this Court.

Plaintiff originally sued in the Supreme Court, Columbia County, to recover overtime compensation and liquidated damages under Sec. 16(b) of the Fair Labor Standards Act

of 1938. The case was tried on an agreed statement of facts which has never been altered and which shows that during the period for which overtime compensation is sought, plaintiffs were employed in doing work under defendant's contract to repair an instrumentality of commerce. Judgment dismissing plaintiff's complaint was entered in the Trial Term, and was subsequently affirmed by the Appellate Division, Third Department, and by this Court. Plaintiff then petitioned in the United States Supreme Court for a writ of certiorari. Certiorari was granted and the judgment reversed. Upon consideration of a petition for rehearing subsequently filed in the United States Supreme Court by defendant, the Supreme Court modified its earlier decision by stating that the reversal was "without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit was brought." Upon remand of the case to the Trial Term, defendant moved for dismissal and plaintiff for summary judgment under Rule 113 of the Civil Practice Act. Plaintiff's motion was granted, with costs and interest; defendant's motion was denied. The Appellate Division, Third Department, affirmed the entry of judgment for the plaintiff and the dismissal of defendant's motion.

This matter came on to be heard by this Court upon the defendant's appeal from said judgment of the Appellate Division, Third Department. In affirming said judgment on June 14, 1944 this Court, in an opinion by Judge Loughran, reviewed the history of the proceedings and then said: (293 N. Y. 126)

> "The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under a contract through which the defendant undertook with a

railroad company to reconstruct two bridges that were instrumentalities of interstate commerce. (262 App. Div. 665, 667). These conceded facts are now said by the defendant to be insufficient as a basis for disposition of the issue as to whether the plaintiffs were 'engaged in commerce' at the time they were so employed.

"We concur with the courts below in their rejection of that contention. The agreed statement of facts on the face of it was a case within the statute. (*McLeod* v. *Threlkeld*, 319 U. S. 491, 494). No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable."

Subsequent to the decision in this case by this Court, the appellant duly applied to the United States Supreme Court for a writ of certiorari for the purpose of having the United States Supreme Court determine whether (1) the entry of judgment for the plaintiffs on the record in this case is in conflict with the decisions of the United States Supreme Court interpreting the Fair Labor Standards Act of 1938 and with the prior mandate of the United States Supreme Court in these proceedings, and (2) whether interest may be added to the statutory double damages awarded an employee in an action brought under the federal act.

Notwithstanding the aforequoted clear and unequivocally stated grounds of decision in the opinion of this Court, the plaintiffs-respondents, in their brief in opposition to the granting of petitioner's petition for writ of certiorari by the United States Supreme Court, argued that this Court, in ordering the affirmance of the judgment of the Appellate Division, had rested its decision wholly upon grounds of New York civil procedure. The plaintiffs-respondents have argued to the United States Supreme Court, both directly and impliedly, that while their case might have been deemed insufficiently proved, had defendant supplied an answering

affidavit under Rule 113 of the New York Civil Practice Act, this Court's decision is to be taken as meaning that defendant's failure to submit such affidavit, averring the existence of a defense, cures the plaintiff's deficiency of proof under New York local, procedural law. Thus the plaintiffs state, at pages 9 and 10 of their brief, opposing the granting of certiorari:

> "The only issue determined by the state courts, and the only issue presented to this Court, is one of civil procedure. The petitioner herein could easily have required of the plaintiff proof of the details of each workers' duties, by merely interposing on the motion for summary judgment a short answering affidavit. The failure to file any answering affidavit whatsoever resulted, as Judge Loughran stated, in (R. 64): 'No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable.' "

On November 6, 1944, the United States Supreme Court granted defendant's petition for a writ of certiorari herein, but limited the review upon certiorari to the second question, namely, that concerning interest, as set forth in defendant's petition. Thus, the defendant-appellant herein has been denied the right to obtain final determination by the United States Supreme Court of the federal question presented and decided by this Court, due to the interpretation of the nature of this Court's decision as presented to the Supreme Court by the argument of plaintiffs-respondents.

I am informed, however, by the Office of the Clerk of the United States Supreme Court that an application for removal of the limitation upon the grant of certiorari will be considered by that Court, provided such petition is duly filed on or before December 1, 1944. Defendant-appellant

intends to make such application. Accordingly it is of the greatest importance that before said last-mentioned date an order be made by this Court showing that the aforementioned federal question was decided by this Court and that the basis of decision was not, as the plaintiff has argued, the defendant's failure to aver by affidavit the existence of a triable issue under Rule 113 of the Civil Practice Act.

The afore-quoted language from this Court's opinion clearly shows that such federal question was decided.

The proposed addition to the remittitur, which defendant requests be incorporated therein, does not effect any modification or alteration of this Court's opinion. It is requested solely for the purpose of negativing the impression, created by plaintiff's brief in opposition to certiorari in the United States Supreme Court that this Court's decision was placed solely upon local procedural grounds rather than those stated in its opinion.

The remittitur of this Court herein was filed in the office of the Clerk of the County of Columbia on June 22, 1944.

That because of the necessity for a prompt hearing in this Court, sufficient time does not remain in which to serve the usual notice of motion returnable at the next motion day of this Court on the 20th instant, and accordingly deponent requests an order to show cause returnable before this Court on said date, requiring plaintiff to show cause why the remittitur herein should not be amended by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts

states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant acquired the burden, which it failed to sustain, of establishing the nature of the employment of the individual respondents."

CHARLES E. NICHOLS

Subscribed and sworn to before
me this 13th day of November, 1944

E. MAE KINGSTON
Notary Public—Albany County, N. Y.



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In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*

Respondent.

MOTION FOR EXTENSION OF TIME

HENRY E. FOLEY,
Counsel for Petitioner

Dated: November 24, 1944

GEORGE H. DEAN CO., PRINTERS, BOSTON

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

MOTION FOR EXTENSION OF TIME

Now comes J. F. Fitzgerald Construction Company, your petitioner, by Henry E. Foley, its counsel, and respectfully represents to this Honorable Court as follows:

1. On September 13, 1944, your petitioner filed herein a petition for writ of certiorari to the Supreme Court of the State of New York for the purpose of obtaining review and determination of a judgment entered in said Court, upon remittitur from the Court of Appeals of the State of New York, in an action originally commenced by the respondent herein in said New York Supreme Court to recover overtime compensation and liquidated damages in accordance with the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, a Federal statute. In

said petition your petitioner requested consideration and review of the following two questions:

(1) Whether the entry of judgment for the plaintiffs by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, except merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs and others were employed by your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

2. On November 6, 1944, this Court granted your petitioners said petition for writ of certiorari, but limited said grant to the second question presented by said petition. The terms of the order of this Court are as follows:

> "The petition for writ of certiorari is granted limited to the second question presented by the petition for the writ and the case is transferred to the summary docket and assigned for argument immediately following No. 421. The Solicitor General is invited to file a brief amicus curiae in this cas and in No. 421 (Arsenal Building Corporation v. Greenberg, October Term, 1944) if so advised."

3. Since the entry of the order of this Court, on November 6, 1944, your petitioner has caused to be filed in the Court of Appeals of the State of New York a petition seeking amendment of the remittitur of said Court so as to state more explicitly the ground of its decision and so as more fully to reveal that in issuing said remittitur said court had necessarily passed upon a question of federal law which your petitioner believes is an important federal ques-

tion which should be reviewed by this Court. Said motion was filed in said Court of Appeals on November 13, 1944, and thereupon an order was entered by said Court directing the respondent herein to show cause on November 20, 1944 why said Court should not enter an order requesting a return of its remittitur and that said remittitur be amended. Said motion is now under consideration by said Court. It is anticipated that decision will be rendered on November 30, 1944.

4. Your petitioner wishes to file herein (a) a motion requesting that this Court's limitation upon its grant of certiorari, hereinbefore referred to, be stricken, and that the cause be removed from the summary docket, and (b) a short and concise brief in support of said motion. Your petitioner, however, is advised that such motion and brief must be filed on or before December 1, 1944, unless an extension of the time for the filing thereof be obtained.

5. In view of the fact that decision has not yet been announced by the Court of Appeals of the State of New York upon your petitioner's motion, hereinbefore in paragraph 3 hereof referred to, your petitioner does not believe that said motion and brief, hereinbefore in paragraph 4 hereof referred to, directed to this Court can be adequately prepared and printed within the short period of time which will be remaining between the time of decision by the Court of Appeals and December 1, 1944, and accordingly your petitioner wishes to obtain an extension to December 15, 1944, of the time within which such motion and brief may be filed.

6. Your petitioner affirms that this motion and the aforementioned motion and brief which your petitioner intends to file are and will be filed in good faith and not for purposes of delay, and in the latter connection states that the

office of the Clerk of this Court has advised your petitioner that argument of the cause referred to in this Court's present order with respect to certiorari will probably not be had until February, 1945.

WHEREFORE, your petitioner respectfully prays that the time within which your petitioner may be permitted to file herein a motion to strike from this Court's order herein, dated November 6, 1944, the limitation upon the grant of certiorari contained therein and the portion thereof transferring this cause to the summary docket, together with a concise brief in support of such matter, be extended to December 15, 1944.

Respectfully submitted,

HENRY E. FOLEY
Counsel for J. F. Fitzgerald Construction Company.

Dated: November 24, 1944.

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CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*

Respondent.

PETITION FOR REHEARING

HENRY E. FOLEY,
Counsel for Petitioner

Dated: December 12, 1944

GEORGE H. DEAN CO., PRINTERS, BOSTON

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

PETITION FOR REHEARING

Now comes J. F. Fitzgerald Construction Company, petitioner herein, by Henry E. Foley, its counsel, and respectfully represents to this Honorable Court as follows:

1. On September 13, 1944, your petitioner filed herein its petition, entitled—Petition for Writ of Certiorari to the Supreme Court of the State of New York—for the purpose of obtaining review and determination of a judgment entered in said Court, upon remittitur from the Court of Appeals of the State of New York, in an action originally commenced by the respondent herein in said New York Supreme Court to recover overtime compensation and liquidated damages in accordance with the provisions of

Section 16 (b) of the Fair Labor Standards Act of 1938, a Federal statute. In said petition your petitioner requested consideration and review of the following two questions:

(1) Whether the entry of judgment for the plaintiffs by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, except merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs and others were employed by your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

2. On November 6, 1944, this Court granted your petitioners said petition for writ of certiorari, but limited said grant to the second question presented by said petition. The terms of the order of this Court are as follows:

"The petition for writ of certiorari is granted limited to the second question presented to the petition for the writ and the case is transferred to the summary docket and assigned for argument immediately following No. 421. The Solicitor General is invited to file a brief amicus curiae in this case and in No. 421 (Arsenal Building Corporation v. Greenberg, October Term, 1944) if so advised."

3. After the entry of said order of this Court on November 6, 1944, your petitioner caused to be filed in the Court of Appeals of the State of New York a petition seeking amendment of the remittitur of said Court so as to state more explicitly the ground of its decision and so as

more fully to reveal that, in issuing said remittitur, said court had necessarily passed upon a question of federal law which your petitioner believes is an important federal question and one which should be reviewed by this Court.

4. On December 2, 1944, the Court of Appeals of the State of New York granted your petitioner's motion and ordered said remittitur amended by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

A copy of the order of the Court of Appeals amending its remittitur is attached hereto, made part hereof and marked "A" and a certified copy thereof has been filed with the Clerk of this Court.

5. From said order of the Court of Appeals of the State of New York, it is now apparent that the Court of Appeals, in sustaining judgment for the respondent herein, decided a question of Federal Law and that the respondent erred when it represented to this Court in its brief filed herein and entitled—Brief in Opposition to Petition for Writ of Certiorari—that:

> "The only issue determined by the State courts, and the only issue presented to this Court, is one of civil procedure. *The petitioner herein could easily have required of the plaintiff* (Pedersen) *proof of the details of each*

worker's duties, by merely interposing on the motion for summary judgment a short answering affidavit." (P. 9) (Italics and parenthetical insertion supplied).

By its order the Court of Appeals has now made clear (1) that its decision did not rest on the procedural ground, claimed by the respondent, (namely, that your petitioner, by failing to file an affidavit of defense in response to respondent's motion for summary judgment, had relieved the respondent of its admitted burden of proving the nature of the activity of the employees on whose behalf the suit was brought) and (2) that said decision of the Court of Appeals did rest on the substantive ground that the respondent established a prima facie case by showing that the employees were employed in doing work (whatever that work may have been) under your petitioner's contract for the repair of an instrumentality of commerce and that, upon such showing, without more, your petitioner had the burden of going forward with evidence to show that the employees, on whose behalf the respondent is suing, were not doing work "so closely related to commerce as to be in practice and in legal contemplation a part thereof," within the meaning of that phrase in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 and *McLeod* v. *Threlkeld*, 319 U. S. 491.

6. The Court of Appeals has by its recent order made clear that it has decided a federal question of substance—namely that of the extent of the burden of proof in a proceeding under the Fair Labor Standards Act of 1938. The Court of Appeals has now made clear that it has decided (1) that employees establish a "prima facie" case merely by showing that they are engaged in a project in the course of which certain separable and identifiable activity is admittedly intrastate in character and certain other such activity is admittedly interstate, without any showing as

to the particular activity in which they, or any of them, were at any time engaged, and (2) that upon such "prima facie" showing the employer has the burden of going forward with evidence to show in defense that the activity of particular employees was in fact intrastate. Such a decision is obviously a decision of a federal question of substance. The question of the extent of the burden of proof under a federal statute such as this, is clearly a federal question. This, the Court of Appeals has recognized expressly in its amended remittitur when it stated that "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938." And in this conclusion, that the matter of the extent of the burden of proof is a Federal question, the Court of Appeals was clearly right. Uniform interpretation and application must be given to such a statute, and, as held by this Court in *Garrett* v. *Moore-McCormack Co., Inc., et al,* 317 U. S. 239, 244 (1942):

> "This uniformity requirement extends to the type of proof necessary for judgment."

Numerous decisions of this Court support this conclusion. Thus, in *Central Vermont Railway* v. *White, Administratrix of White,* 238 U. S. 507 (1915), this Court said with respect to the matter of proof in an action under the Federal Employers' Liability Act:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel* v. *Holbrook,* 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name."

> "*So, too, as to the burden of proof.* As long as the question involves a mere matter of procedure as to the

time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law.

"But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure." (P. 511-512).

Similarly, in *New Orleans and Northeastern Railroad Company* v. *Harris*, 247 U. S. 367 (1918) this court said, in a similar proceeding:

"These established principles and our holding in *Central Vermont Railway Co.* v. *White*, 238 U. S. 507, 511, 512, we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states." (P. 372)

and in *Gulf, Mobile & Northern Railroad Company* v. *Wells*, 275 U. S. 455 (1928) this Court pointed out,

"Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient, in kind or amount, to warrant a finding that the negligence of the engineer was the cause of the injury, the judgment must be reversed." (P. 457).

7. The Court of Appeals has erroneously decided the important Federal question as to the extent of the showing which must be made to warrant recovery under the Act. The Court of Appeals has, in substance, held that the employees on whose behalf the respondent is suing are entitled to recover on a mere showing that they *might* have been engaged in commerce, that is upon a showing of the nature of their employer's business and that their employment in such business *might* have been, although it admittedly need not have been, "so closely related to commerce as to be in practice and in legal contemplation a part of it". The respondent has shown only (1) that *your peti-*

tioner was engaged in a project calling for the repair of an instrumentality of commerce and (2) that the employees on whose behalf the respondent is suing, were employed in doing work related to that project. In a project such as that in which your petitioner was engaged, there are obviously many separable activities, some of which (such as actual repair work) if performed by the employees represented by the respondent, would constitute engagement in commerce and others of which (such as preliminary and incidental or salvaging work) obviously would not constitute such engagement (See pages 10 to 13 of our Petition for Certiorari filed herein and dated September 11, 1944). That such divergent activities existed has been recognized by the respondent in its brief in opposition to our petition. (See quotation therefrom in paragraph 5 hereof). The existence of such divergent activities has also been recognized by the Court of Appeals, as is apparent from its amended remittitur. The Court of Appeals has concluded, however, that, on a showing that employees, on whose behalf the respondent is suing, (and these employees are only some, not all, of the employees engaged on the project (R. 9)) were engaged on a project, certain separable and identifiable activity in connection with which would necessarily not have been so closely related to commerce as to be a part of it and without any showing as to the particular activity of any employee in any week or at any time, the respondent has the burden of going forward with evidence to show the nature of the activity of the particular employees. Such a conclusion is in direct conflict with the decision of this Court in *Warren Bradshaw Drilling Company* v. *Hall*, 317 U. S. 88 (1942), and of other courts which have passed upon the question of the extent of an employee's burden of proof under the Act. Thus in the *Warren Bradshaw Drilling Company* case, this Court said,

"The burden was therefore upon respondents to prove that in the course of performing their services for peti-

tioner and *without regard to the nature of its business*, they were, as its employees, engaged in the production of goods within the meaning of the Act, and that such production was for interstate commerce.". (Italics supplied). (P. 90).

Similarly in *Super-Cold Southwest Company* v. *McBride*, 124 Fed. (2d) 90 (1941) the Circuit Court of Appeals for the Fifth Circuit held that,

> "An employee working both interstate and intrastate must point out what part of his work was in intrastate commerce and what part in interstate commerce." (P. 92).

So also in *Schwartz* v. *Witwer Grocer Co.*, 47 F.S. 1003 (No. D. Iowa) (1943) the Court pointed out

> "The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed." (P. 1004).

(See accord *Armour & Co.* v. *Carpenter*, 141 Pac (2d) 797 (Okl.) (1943)). It is obvious that the respondent has not borne the burden of proof required by said decisions and that the Court of Appeals erred in its holding.

8. Strong reasons exist for review by this Court of the judgment herein. The Fair Labor Standards Act of 1938 is a statute of major public significance. Vast numbers of employers and employees are affected thereby. No doubt should exist as to the extent of the burden of proof in proceedings under the Act. If, as is believed, the matter of burden of proof has already been settled by this Court in *Warren-Bradshaw Drilling Co.* v. *Hall* (*supra*) the Court of Appeals of the State of New York has decided this proceeding in direct conflict with the holding of this Court

therein and judgment should be reversed. Your petitioner should not be prejudiced by an erroneous decision of a State Court. If, on the other hand, the *Warren-Bradshaw Drilling Co.* decision is not controlling, the law on the point should be settled. Employers and employees should be able to know the requirements as to proof in proceedings under the Act. Rights should not be lost because of uncertainty in this regard.

WHEREFORE, your petitioner respectfully prays that this petition for a rehearing be granted and that the limitation, imposed by the order of this Court herein dated November 6, 1944, in granting a writ of certiorari, be removed.

Respectfully submitted,

HENRY E. FOLEY.
Counsel for Petitioner

"A"

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the *thirtieth* day of *November*, A. D. *1944*.

PRESENT, HON. IRVING LEHMAN,
Chief Judge, Presiding.

CHRIS PEDERSEN, *ind., and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

vs.

J. F. FITZGERALD CONSTRUCTION COMPANY,
Appellant.

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal

statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

AND the Supreme Court, Columbia County, State of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

RAYMOND J. CANNON
Deputy Clerk.

(SEAL)

SUPREME COURT OF THE UNITED STATES.

No. 462.—October Term, 1944.

J. F. Fitzgerald Construction Company, Petitioner,
vs.
Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself, etc.

On Writ of Certiorari to the Supreme Court of the State of New York.

[April 9, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

The writ of certiorari in the instant case raises two questions for consideration: the first, whether an employee who obtains a judgment for unpaid overtime wages and liquidated damages under Section 7(a)[1] and Section 16(b)[2] of the Fair Labor Standards Act of 1938 is entitled to interest on such sums; the second, a narrow question with respect to the interpretation of a judgment of this Court, which was entered in its per curiam opin-

[1] Section 7(a), 52 Stat. 1063, provides:
"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
(2) for a workweek longer than forty-two hours during the second year from such date, or
(3) for a workweek longer than forty hours after the expiration of the second year from such date,
unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[2] Section 16(b), 52 Stat. 1069, provides:
"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

ion on a prior writ of certiorari, reversing a prior state court judgment in this same case.

The proceedings leading to the first writ began when the respondent, Pedersen, an employee of the petitioner, a construction company, instituted an action in the Supreme Court of the State of New York, in behalf of himself and other employees, to recover overtime compensation and liquidated damages alleged to be due by virtue of Sections 7 and 16(b) of the Fair Labor Standards Act. The action was tried on an agreed statement of facts which stated that the New York Central Railroad Company operated interstate trains over four bridges located on its right of way in the State of New York; that abutments supporting two bridges were destroyed and that the substructures of the two other bridges were damaged by a flood. The stipulation also stated:

> "Thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.
>
> . . . . . .
>
> "Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule 'A' annexed hereto."

After making findings of fact in conformity with the stipulation, the trial court dismissed the respondents' complaint.[3] The Appellate Division[4] and Court of Appeals[5] affirmed the lower court decision on the theory that the nature of the employer's general business activity—not the activities of employees on a particular job—determined whether an employee was "engaged in [interstate] commerce" within the meaning of Section 7(a) of the Act. Since the petitioner, an independent contractor not itself engaged in interstate commerce, was employed by the railroad to perform work local in character, it was felt petitioner's employees were not subject to the Act. On petition for certiorari, this Court reversed[6] the judgment of the state courts dismissing

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[3] Pedersen *v.* Fitzgerald Constr. Co., 173 Misc. 188.

[4] *Ibid.*, 262 App. Div. 665.

[5] *Ibid.*, 288 N. Y. 687, affirming without opinion.

[6] *Ibid.*, 318 U. S. 740.

the complaint, on the authority of *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, in which the Fair Labor Standards Act was held to apply to employees engaged in the actual repair of a facility of interstate commerce. On petition for rehearing by the petitioner in the instant case, our judgment was amended by adding:

> "and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." 318 U. S. 742.

This left open for trial the question of whether each member of the class was engaged in interstate commerce as alleged in the petition.

After remand to the state courts, the petitioner moved in the trial court to dismiss the complaint on the record of the prior proceedings apparently on the theory that the agreed statement of facts in the prior proceedings were insufficient to prove that the respondents, employees, were "engaged in [interstate] commerce." Petitioner did not attempt to introduce any evidence rebutting any inference to the contrary that might be drawn from the stipulation of facts in the record. Respondents thereupon moved for summary judgment under Rule 113 of the New York Rules of Civil Practice. The lower court entered judgment for the respondents, employees, for statutory wages and liquidated damages, with interest on such sums from April 1, 1939.[7] The Appellate Division[8] and Court of Appeals affirmed this decision.[9] Because the allowance of interest by the Court of Appeals raised a federal question of substance not heretofore determined by this Court, and in order to clarify doubts as to the meaning of our previous judgment in this case, we granted certiorari.[10] Jurisdiction of this Court rests on Section 237(b) of the Judicial Code.

In *Arsenal Building Corporation, et al.* v. *Greenberg*, No. 421, 1944 Term, decided this day, we held that an employee was not entitled to interest on sums recovered in an action brought under Section 16(b) of the Fair Labor Standards Act. This question is discussed in that opinion and for the reasons set forth therein, we hold that the New York Court of Appeals erred in allowing

[7] Opinion unreported.

[8] Pedersen v. Fitzgerald Constr. Co., 266 App. Div. 1032.

[9] Ibid., 293 N. Y. 126.

[10] 323 U. S. —.

interest on the sums recovered by the respondents in the instant case.

Petitioner contends that the state courts erred in sustaining a judgment for respondents. It is argued that the latter failed to satisfy the burden of proof that the particular activities of the respondents constituted engaging "in [interstate] commerce." We are of a contrary opinion. The agreed statement of facts, which was part of the record both for purposes of petitioner's motion to dismiss and respondents' motion for summary judgment, constitutes sufficient evidence to support the state courts' ruling in this matter.[11] The agreed statement of facts states that the petitioner entered into a contract with the railroad "for the construction of entirely new abutments under the two bridges . . . . and for repairing the substructures of the other two bridges," all four of these bridges being part of the railroad's interstate line. It was also stipulated that the respondents were "doing work under said contract." It is clear that employees who actually repair abutments or substructures of bridges on which are laid tracks used in interstate transportation are "engaged in [interstate] commerce." *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 130; *McLeod* v. *Threlkeld*, 319 U. S. 491, 494. The stipulation of facts in this case recites specifically and precisely that the contract was for such work and also that the respondents were engaged in doing work under said "contract." The stipulation of facts would not seem to embrace activities not essential and a part of the main work of repair. This interpretation of the stipulation accords with that adopted by the state trial court.[12] In amending our judgment on rehearing[13] when this case was previously before us on writ of certiorari, the way was opened to petitioner to contest the issue of whether each respondent was himself actually engaged in interstate commerce. A doubt had arisen as to whether this could be done because our judgment of reversal was based explicitly

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[11] See p. 2 *supra*.

[12] The New York trial court stated in its opinion [unreported]:

"The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing *this particular work*. . . . But in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (Pedersen *v.* Delaware, Lackawanna & Western Railroad Co 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made. . . ."

[13] 318 U. S. 742.

on the *Overstreet* case, and in that decision we conclusively determined that the particular employees there involved were covered by the Act. On the remand to the state courts, petitioner did not contest respondents' claim on this issue although it appears it could have done so when the respondents moved for summary judgment.[14] Since the uncontested facts in the record are to the effect that the respondents were actually engaged in repairing the abutments and substructure, the judgment of the state court must be sustained in this respect.

The judgment of the state court is affirmed except in so far as it provides for recovery of interest on the sums adjudged to be due respondents under the Act; in this latter respect the judgment is reversed.

[14] The trial court stated in its opinion [unreported]:

"It was no more a direction to the plaintiff than it was a permission to the defendant to reopen the matter, if either so desired, and could so do under our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates."